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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~69~~ 8

GEORGE MATTINGLY, GEORGE E. KIRK, HENRY K. RANDALL, ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 62.

GEORGE MATTINGLY, GEORGE E. KIRK, HENRY K. RANDALL, ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Original bill.—Filed Sept.* 11, 1872.

In the supreme court of the District of Columbia, the 11th day September, 1872.

GEORGE MATTINGLY, GEORGE E. KIRK, HENRY K. Randall, Henry Wolford, Mark Shilling, Thomas Fahey, T. F. Maher, John G. Kessler, W. C. Harvey, Robert Mehoney, B. Shea, John G. Schwab, Lewis Kissuor, Jacob D. Hutton, James H. Johnson, Mary E. Greene, James C. DeAtly, B. L. Jackson, W. B. Jackson, Mary Shreves, George W. Dant, Robert M. Johnson, John T. Van Riswick, Charles B. Church, John T. Cassell, Ann J. Garrett, Samuel F. Lomax, J. T. Lewis, William H. Croggon, John T. S. Croggon, John R. W. Mankin, Joseph Bishop, Ira Crosson, Mary E. Martin, Jackson Yates, Henry A. Clarke, John T. Springman, William Dawson, R. G. Campbell, B. F. Gilbert, James De Atley, Catherine Hardy, Margaret Milburn, Washington B. Williams, complainants,

vs.

THE DISTRICT OF COLUMBIA, HENRY D. COOKE, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, and George W. Linville and Albert Gleason, defendants.

In equity. No. 2973. Docket 12.

2 To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants complain as follows:

1. They are all residents of the city of Washington, in the District of Columbia, and sue as the owners and holders of certain real estate, lots of ground, and premises hereinafter to be mentioned and specified, in their own behalf and in behalf of all others similarly circumstanced, who may come in and share the costs of these proceedings.

2. The defendant, "The District of Columbia" is a body politic and corporate under and by virtue of the act of the Congress of the United States approved February 21, 1871, entitled "An act to provide a government for the District of Columbia," and the defendants, Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, are residents of the said District of Columbia, and constitute and compose the Board of Public Works of said Dis-

3 trict, created by and provided for by the 37th section of the said act, and appointed in pursuance thereof.

3. The complainants were, on and before the 30th day of March, A. D. 1871, and yet are, severally seized and possessed in fee-simple, or were and are otherwise the owners and holders of certain lots, pieces, or parcels of ground and premises, situate and lying in the said city of Washington and District of Columbia, and adjacent to and bounding upon the line of Seventh street west, in said city, between B street south and the Potomac River, as will more fully and specifically appear from a

schedule hereunto annexed, marked "Complainants' Exhibit No. 1," and made part of this bill of complaint.

4. The complainants being so seized and possessed as aforesaid, have been assessed by the said The District of Columbia, and by the aforesaid Board of Public Works, and have been required and directed to pay to the said board of public works certain specified sums of money
4 on account of certain *specified sums of money on account of certain* alleged improvements, sewerage, and paving constructed, or alleged to have been constructed, on said Seventh street west, adjacent to and in front of the lots of ground and premises aforesaid of the complainants; and they have been notified by the said board of public works, and its officers and agents, that said lots of ground have been assessed for such special improvements at the rate of eight dollars and seventy-four $\frac{41}{100}$ cents (8.74\frac{41}{100}$) per front foot for each and every front foot of the said lots, being in all the sums set opposite to the names of the complainants respectively in the schedule hereinbefore mentioned, marked "Complainants' Exhibit No. 1." And the defendants have notified the complainants individually and severally that in case of the neglect or refusal of the complainants to pay the amounts so as aforesaid assessed against them, the said board of public
5 works, after the expiration, will immediately issue certificates of indebtedness against the aforesaid property of the complainants; which assessment and certificate are declared to be a lien upon the said property and lots of ground, in pursuance of a certain act of the legislature of the District of Columbia, approved August 10, 1871, of which said notice and act of the legislature a copy is herewith annexed, marked "Complainants' Exhibit No. 2," and made part of this bill. And the complainants are further notified in and by the said notice that, if the said assessment, with interest at the rate of ten per cent., should remain unpaid for one year, the said board of public works, upon the application of any holders of any of the said certificates, shall proceed to sell the said property, or a proper part thereof.

5. The complainants charge that in pursuance of certain ordi-
6 nances of "the mayor, board of aldermen, and board of common council" of the city of Washington aforesaid, approved May 9, 1870, and June 10, 1870, and an ordinance amendatory of the former, approved May 28, 1871, of which said ordinances copies are hereto annexed, marked "Complainants' Exhibit No. 3," and made part of this bill of complaint, the said mayor, board of aldermen, and board of common council, on the 30th day of March, A. D. 1871, entered into a contract with one George W. Linville, whereby, in consideration of certain prices therein specified to be paid to him, the said Linville agreed and contracted to construct a sewer in said Seventh street west, from Virginia avenue to the Potomac River, with man-holes, drops, traps, and lateral branches; and to pave the carriage-way thereof, from B street south to Water street, with the Follansbee wooden pavement, and
7 to do all the necessary grading and furnish all the sand and gravel to make said pavement complete, all in accordance with certain proposals and specifications signed by the said mayor of Washington and the said George W. Linville. A copy of the said contract, proposals, and specifications, is hereto annexed, contained in complainants' exhibit No. 4, made part of this bill of complaint.

6. Subsequently, the said George W. Linville, having entered upon the performance of the said work, the charter or act of incorporation of the said city of Washington was repealed by the aforesaid act of Congress, and the defendant, The District of Columbia, by virtue of the

same act, succeeded to all the rights and privileges of the said the mayor, board of aldermen, and board of common council of the city of Washington. Whereupon, the said board of public works as-
8 sumed the control and direction of the aforesaid sewer and paving and other work to be done under the aforesaid contract.

7. Subsequently, by an order bearing date the 3d day of July, A. D. 1871, the said Board of Public Works, illegally and without any warrant whatever of law, and in violation and derogation of the aforesaid contract, directed the said George W. Linville to construct the said sewer in a different manner and of different dimensions from those provided for in said contract; and the said George W. Linville, in compliance with said order, constructed the said sewer in a manner and of dimensions different from the provisions of the aforesaid contract and specifications, and without any valid contract entered into with said board of public works, as required by law, whereby the cost of the said sewer was greatly enhanced and the liabilities of these complainants unjustly and unwarrantably increased. A copy of the said order is found in complainants' exhibit No. 4, hereinbefore referred to.

9 8. These complainants charge that the work of the aforesaid sewer, paving, and other work provided for in the aforesaid contract was imperfectly and badly done in many particulars, and did not, and does not now, correspond to the requirements of the aforesaid contract, proposals, and specifications; that in the construction of said sewer the earth, as filled, was not puddled, and there was no systematic or proper inspection of the work as it progressed; that the foundation of the pavement is not of clay, free of loam, and rammed and rolled, as required by the contract and specifications, and that not more than three inches of gravel on an average has been laid under said pavement, and said gravel has not been rolled and rammed; whereas said contract requires eight inches of gravel and four of sand; that the said work, being so imperfectly constructed, will last but a brief time, and
10 the complainants will thus be wrongfully and unjustly subjected to further costs and assessments for the repair thereof.

9. These complainants aver and charge that if the said work had been fairly and properly done, in accordance with the provisions of the aforesaid proposals, contract, and specifications, and a fair and just assessment had thereon, upon the property aforesaid of the complainants, the proper share of the complainants would have been no more than about two dollars and sixty-four cents ($2.64) per front foot assessable upon and chargeable to the complainants on account of the property aforesaid, and that no more than the said sum is now justly due from the complainants in the premises upon a fair and proper accounting. But these complainants further say that, inasmuch as the said work has been defectively and improperly done, and is not in accordance with the requirements of the proposals, contract, and specifications
11 aforesaid, they are not justly and lawfully chargeable with any sum whatever.

10. These complainants further allege and aver that upon the receipt by them of the notices aforesaid they respectfully requested to be furnished with a bill of items of the aforesaid assessments levied upon them, and called upon the officers of said board of public works for that purpose. But the said Board of Public Works has wholly neglected and refused to furnish such a bill of items, and the complainants have never been furnished with any such bill, as was their right. But the complainants have reason to suppose that a certain printed statement, published in one of the newspapers of the city of Washington subse-

quently to such request of these complainants, was and is intended by said board of public works to be an itemized account and detailed statement of the aforesaid assessment and of the grounds thereof,
12 which said printed statement is annexed hereunto, marked "Complainants' Exhibit No. 4," and made part of this bill of complaint.

11. These complainants further aver and say that the assessment so as aforesaid made on the property of these complainants is fraudulent, excessive, and illegal in divers particulars, and especially in these, among others: that the sum of $577 is therein charged for superintendence without any warrant of law; that each lot is charged with a proportionate share of the cost and expenses of the entire street, whereas it should be charged only with its own special improvements, to wit, with its proportionate share of the cost of the improvements of the street immediately adjoining thereto; that the assessment includes the cost and expense of the aforesaid work in front of the churches and schoolhouses on said Seventh street, a proportionate share whereof,
13 amounting to about $0.11 $\frac{43}{100}$ cents per front foot, is charged upon the plaintiffs and their property aforesaid, contrary to law; that the sum of five per cent. of the alleged total cost, said five per cent. amounting to $7,879.16, is arbitrarily added in the said assessment to the said total cost, without any cause or ground whatever alleged, and wholly without warrant or authority of law; that said assessment includes curbing of the street with new curb and paving the sidewalks, (including Scharf pavement,) for which the complainants believe no contract whatever existed, and which was wholly unnecessary and uncalled for by the condition of the said curbing and sidewalks and lots of the complainants remote from the said curbing and paving and in no way benefitted thereby, have been specially assessed therefor in said assessment; that the said assessment includes certain work alleged to have been done by one Albert Gleason, which work these complainants aver and charge to have been done without warrant of law;
14 that the said assessment further includes the cost and expense of a six-foot sewer along Water street, between Sixth street west and said Seventh street, not provided for in the contract aforesaid with George W. Linville, nor, as far as these complainants are advised, in any contract whatsoever; nor properly chargeable in any event to these complainants on account of their property aforesaid abutting on said Seventh street; that old materials, curbing, cobble-stones, and brick previously used in and upon said Seventh street in the paving of the carriage-way and sidewalk thereof, and of great value, to wit, of the value of $ and upwards, were removed and taken away by the aforesaid work, and converted by the said defendants and their agents and employees to their own private use and profit, and no account taken of the said materials in the said assessment, and no allowance therefor made to these complainants; that various charges for
15 portions of the said work, as stated in the aforesaid Exhibit No. 4, are extravagant and excessive, as will appear upon a just accounting; and that the said work has been very considerably overmeasured, as these complainants expect to show and prove.

12. These complainants further aver and charge that, for the causes and reasons hereinbefore alleged and set forth, and for divers other manifold inaccuracies and irregularities, the aforesaid assessment, levied by the defendants upon these complainants, on account of their property aforesaid, is wholly illegal and unjust, and without warrant of law; and that the said assessment has been fraudulently and wrongfully levied,

with purpose and intent to defraud and injure these complainants, and to deprive them of their just rights in the premises.

13. These complainants further charge and aver that the members of the said board of public works, combining and confederating individually with the said George W. Linville and Albert Gleason to defraud these complainants and the people of the District of Columbia, have permitted and authorized the said Linville and the said Gleason to do the aforesaid work in an imperfect manner, as aforesaid, and in violation of the contract aforesaid, and to impose the said unlawful assessment upon these complainants, and to convert the proceeds thereof to their own private use and emolument; and that the said defendants have converted the materials aforesaid, curbing, bricks, and other materials taken away from the aforesaid Seventh street, to their own use and profit.

The complainants therefore pray as follows:

1. That the District of Columbia aforesaid, and the said Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, and also the said George W. Linville and Albert Gleason, be made parties hereto as defendants, and be served with process.

2. That the said defendants, and each *and each* and all of them, to wit, the said The District of Columbia and the said Board of Public Works, and their successors in office, be enjoined and restrained, by the order of this honorable court, from issuing certificates of indebtedness against the property aforesaid of the complainants on account of the aforesaid assessments.

3. That the temporary injunction or restraining order to the same effect issue against the said The District of Columbia and the said Board of Public Works, their agents, officers, and employees, until the further order of the court in the premises.

4. That the aforesaid assessment on the property of these complainants be declared and decreed to be illegal, null, and void, and of no validity whatever to charge the said property with any lien.

5. That the said George W. Linville and Albert Gleason be enjoined from receiving, and the said The District of Columbia and the said Board of Public Works from making any payment whatever on account of said work.

6. That it be referred to the auditor of this court to state a proper account of the aforesaid work, to inquire into the manner into which the same has been done, and to take testimony in reference to the items of the aforesaid assessment.

7. That the complainants may have such further and other relief as the nature of their case may require, and may seem just and proper in the premises.

GEO. MATTINGLY.
JOHN VAN RISWICK.
HENRY WOLFORD.
CHA'S B. CHURCH.
G. E. KIRK.
C. ASHFORD.
W'M A. CROGGON.

R. T. MERRICK,
Of Counsel.
T. A. LAMBERT,
Sol. for Compl'ts.

19 We do solemnly swear that we have heard read the above bill, signed by us, and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and that the facts therein stated upon information and belief we believe to be true.

GEO. MATTINGLY.
JOHN VAN RISWICK.
G. E. KIRK.
HENRY WOLFORD.
C. ASHFORD.
CHA'S B. CHURCH.
W'M A. CROGGON.

Subscribed and sworn before me this 11th day of September, 1872.
[SEAL.] CHA'S CONS. CALLAN,
Notary Public.

20 *Exhibit No. 1 to bill.*

EXHIBIT No. 1.

List of lots and parts of lots, with the number of front feet in their appropriate squares, abutting upon the line of Seventh street southwest, from its intersection with B street south to the Potomac River, and of the owners thereof, together with the amounts assessed, at the rate of eight dollars and seventy-five $\frac{41}{100}$ cents per front foot for carriage-way and foot-way, and the amount assessed for water-service, as set forth in the bills rendered to said owners by the Board of Public Works of the District of Columbia.

	Name of owner.	Square.	Lots.	Front feet.	Amount ass'd.	Water-service.
	Geo. Mattingly	471	20	20	.....	.....
	Do	do.	21	20	.....	.....
	Do	do.	22	20	.....	.....
	Do	do.	20	20	.....	.....
	Do	do.	24	20	.....	.....
	Do	do.	25	17 $\frac{5}{12}$	.....	.....
	Do	470	8	25	.....	.....
	Do	do.	9	30	.....	.....
	Do	do.	10	30	.....	.....
	Do	do.	11	30	.....	.....
	Do	466	.....	20	.....	.....
21	John Van Riswick	438	11	66 $\frac{4}{12}$	580 02	41 83
	Do	471	17	20	874 88	.....
	Do	471	18	20	174 88	.....
	Do	do.	19	17 $\frac{6}{12}$	153 03	19 19
	Do	do.	16	20	174 88	19 19
	George Kirk	437	1	40 $\frac{3}{12}$	357 23	13 69
	Do	do.	13	18	157 39	.....
	Do	do.	14	48	419 72	27 09
	C. B. Church	465	80	.....	16 94	.....
	Do	467	3	22 $\frac{1}{12}$	193 10	19 19
	Do	do.	4	22	192 38	19 19
	Do	do.	5	22	192 38	19 19
	Do	do.	6	22	192 38	19 19
	Do	do.	9	22 $\frac{3}{12}$	194 57	19 19
	Do	do.	10	100	874 44	38 39
	H. K. Randall	43	6	110	961 36	63 77
	Do	do.	7	65 $\frac{1}{12}$	569 10	31 89
	John T. Cassell	462	18	133 $\frac{3}{12}$	1,138 18	.....
	M. Shilberg & Wolford	435	32	25	218 61	.....
	Do	do.	33	24	209 88	.....
	Do	do.	37	24	209 88	.....

EXHIBIT No. 1—Continued.

	Name of owner.	Square.	Lots.	Front feet.	Amount ass'd.	Water-service.
22	Henry Wolford	435	38	24	208 88	
	T. Fahey	467	7	22	192 38	
	Do	468	12	25	218 61	
	T. F. Maher	465	70	23 8/12	202 56	
	Ann J. Garrett	435	1	25	218 61	
	Do	do.	40	25	218 61	
	S. F. Lomax	438	13	23	201 12	13 95
	J. F. Lewis	468	of 14	20	174 88	
	Do	do.	of 15	2 6/12	21 86	19 19
	Do	do.	of 15	22 6/12	196 74	
	W. H. N. Croggon	466	12	45 7/12	399 27	
	Jas. De Atley					
	John T. S. Coggin	466	of 13	22 1/2 1/2	200 08	
	Do	do.	of 13	16 7/12 1/2	141 50	
	Do	do.	of 13	6 5/12 1/2	58 59	
	Do	do.	14	45 7/12	400 05	
	John G. Kessler	468	18	25	218 61	19 19
	J. K. W. Mankin	466	9	S. 25 6/12	225 18	
	Jos. Bishop	469	of 16	4 1/2 1/2	43 38	
	Do	do.	of 17	14 4/12	125 35	
	B. Shea	469	11	25	218 61	19 19
	Do	do.	of 12	18 3/12	159 58	
23	John G. Schwab	438	of 12	14	122 42	13 95
	L. Kissner	469	of 14	20 3/12 1/2	177 24	19 19
	Do	do.	15	25	218 61	19 19
	Do	do.	of 16	0 8/12 8/12 4	6 39	
	Ira Crosson	436	O		69 95	
	Do	do.	of s. p.	8 [illegible]	76 51	13 69
	Mary E. Martin	465	82	23 8/12	206 94	16 94
	Jackson Yates	434	12	75	655 83	15 94
	Jacob D. Hutton	467	8	23	201 11	
	James H. Johnson	435	26	24	209 88	
	Mary E. Greene	436	H	25	218 60	
	Mary Shreve					
	John T. Springman	469	of 17	10 8/12	93 28	19 19
	Do	do.	18	25	218 61	19 19
	William Dawson, trustee	465	77	23 8/12	206 95	16 94
	Jas. C. DeAtley	468	16	25	218 61	
	B. L. & W. B. Jackson	435	39	24	209 88	
	Geo. W. Dant	466	of 10	820	174 89	
	Catherine Hardy	436	of P		159 67	
	Robert G. Campbell	468	17	25	218 60	
	Washington B. Williams	435	29	21	183 62	15 94
	Craven Ashford	435	30	24	209 88	
	Do	do.	of 31	3	26 23	

24 *Exhibit 2 to bill.*

EXHIBIT 2.

OFFICE OF THE BOARD OF PUBLIC WORKS,
ASSESSOR'S OFFICE,
Washington, D. C., Aug. 13, 1872.

John Van Riswick:

You are hereby notified that lot No. 16, square No. 471, in Washington City, has been assessed for special improvements, said lot fronting 20 feet on the side of 7th st., s. w.

	Rate per front foot. $ Cts.	$ Cts.
Carriage-way and foot-way.....	8 74 41/100	174 88
Water services.....		19 19
		194 07

Cr. by old material.

Received payment.

25 *Exhibit 3 to bill.*

EXHIBIT 3.

An act to construct a sewer in Seventh street west, from the river to the south side of Virginia avenue, and branch sewers in sundry other streets.

Be it enacted by the board of aldermen and board of common council of the city of Washington, That the mayor be, and he is hereby, authorized and requested to cause to be constructed in Seventh street west a barrel-sewer, three feet inside diameter, commencing at the river and running north to south E street, and continuing the same to the south side of Virginia avenue, two feet inside diameter; also branch sewer, two feet inside diameter, in L street, running east to within seventy feet of Sixth street; also in K street, running east to within seventy
26 feet of Sixth street; also in I street, running east to within seventy feet of Sixth street; also in H street, running east and west to within seventy feet of Sixth and Eighth streets; also in G street, running east and west to within seventy feet of Sixth and Eighth streets; also in F street, running east and west to within seventy feet of Sixth and Eighth street'; also in E street, running east and west to within seventy feet of Sixth and Eighth streets; also in D street, running west to within seventy feet of Eighth street.

SEC. 2. And be it further enacted, That in order to defray the expense incurred under this act, a special tax equal to the cost thereof be, and the same is hereby, laid upon all the lots or subdivisional parts of lots bordering along the line of said sewers; the said tax to be assessed and collected according to law: Provided, That the expense of constructing the man-holes, drops, traps, lateral branches, and cross-
27 ings of avenues, streets, and alleys be defrayed out of the funds of the seventh ward, of which a sufficient amount is hereby appropriated; said sewers to be built under the direction of the superintendent of sewers, carriage-ways, &c., superintendence of the commissioner of the seventh ward, and two assistant commissioners, to be appointed by the mayor.

Approved May 9th, 1870.

CHAP. 721.—An act to pave Seventh street southwest from B street to Water street southwest.

Be it enacted by the board of aldermen and board of common council of the city of Washington, That the mayor be, and he is hereby, authorized and requested to cause the carriage-way of Seventh street southwest, from B to Water street southwest, to be paved with a wood pavement.

28 SEC. 2. Be it further enacted, That the work be executed in the manner and under the superintendence provided by law; and to

defray the expense of said improvement a special tax equal to the cost thereof is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; said tax to be assessed and collected in conformity with existing law: Provided, That the expense of paving at intersection of streets shall not be assessed on the owners of private property, but shall be paid out of the ward funds.

Approved June 10th, 1870.

CHAP. 467.—An act to amend an act entitled "An act to construct a sewer in Seventh street west, from the river to the south side Virginia avenue, and branch sewers in sundry streets," approved May 9th, 1870.

29 Be it enacted by the board of aldermen and board of common council of the city of Washington, That the act entitled "An act to construct a sewer in Seventh street west, from the river to the south side of Virginia avenue, and branch sewers in sundry streets," approved May 9, 1870, be, and the same is hereby, so amended as to authorize the mayor to cause a sewer to be laid upon each side of said Seventh street west, (in lieu of the center, as provided in said act,) with the most approved tile, and each not to be more than two feet inside diameter from the river to the south side of E street south, and eighteen inches inside diameter from the last-named point to the south side of Virginia avenue.

Approved March 28, 1871.

30 *Exhibit 4 to bill.*

EXHIBIT 4.

This agreement, made the 30th day of March, A. D. 1871, by and between the mayor, board of aldermen, and board of common council of the city of Washington, D. C., of the first part, and George W. Linville, of the same place, of the second part. Whereas, by an ordinance of the sixty-seventh council of the city of Washington, D. C., approved May 9, A. D. 1870, and by a subsequent ordinance amendatory thereof, the mayor was authorized and requested to cause to be constructed a sewer in Seventh street west, from Virginia avenue to the Potomac River, with man-holes, drops, traps, and lateral branches specified in said ordinances, approved May 9, 1870; and whereas, by an ordinance of said council, approved June 10, 1870, the mayor was authorized and requested

31 to cause carriage-way of Seventh street southwest, from B to Water street southwest, to be paved with a wooden pavement:

Now, therefore, the said party of the first part doth hereby contract and agree with the said party of the second part, that the said party of the second part *that the said party of the second part* shall lay said sewer-pipes and construct the necessary man-holes, traps, and drops, for the prices following, viz:

For eighteen-inch drain-pipe, with house connection, $3.68 per lineal foot.

For twelve-inch lateral pipe, $3.12 per lineal foot.

For necessary man-holes, $100 each.

For necessary traps and drops complete, $147 each.

And that the said party of the second part shall pave said car-

32 riage-way from B to Water street with the Follansbee wooden pavement for the sum of $3.10 per square yard, and do all the necessary grading, and furnish all sand and gravel to make said pavement complete, for the sum of 70 cents per square yard. And it is here-

by further agreed that the proper assessments on the property bordering on said street for each square shall be made for the work hereby contracted for whenever the said sewer-pipes shall be completed for such square, and in the same manner for said pavement when that shall be completed for any one square; the money necessary to pay for all of said work herein provided for to be collected and paid according to law.

The mayor, board of aldermen, and board of common council of the city of Washington.

M. G. EMERY, *Mayor.* [SEAL.]

Witness: M. PECHIN.

GEO. W. LINVILLE. [SEAL.]

Witness: CHA'S W. KREBS.

33 The specifications for paving Seventh street southwest, from B street to Water street, with wooden pavement.

First. The superintendent of streets and sewers and ward commissioner, or their successors in office, shall require the contractor or contractors, at his or their own cost and expense, to remove the present cobble-stone pavement for the width of the street, between the curb lines, except that portion used by the Washington and Georgetown Railroad Company, and deposit them where designated, within a reasonable distance, for the use of the corporation.

Second. In forming the road-bed for the wooden pavement, the contractor or contractors shall use only pure clay, free from loam, and which shall be laid in layers, rammed, and rolled with a heavy roller to a point or level that will admit of eight (8) inches of pure gravel, which
34 must be rammed and rolled; and after such ramming a bed of four (4) inches of pure, sharp sand must be laid, which shall be rolled evenly for the bed of the road. All of which will be determined and directed by the said superintendant and commissioner, who will judge of the necessity according to the foundation found to exist.

Third. The wood used for the pavement shall be heart white pine of the best quality used for pavements, and the blocks shall be of the size, shape, and pattern as submitted in the specification for the Follansbee patent pavement.

Fourth. The work shall be executed in every possible manner to the satisfaction of the commissioner and said superintendent, who will see that every part is executed in accordance with these specifications, and whenever any portion, for any cause or neglect of the contractor or contractors, shall fail in any particular, the said officers shall have
35 the same made good at the contractor's expense. But should it fail by the subsiding of sewers, gas-pipes, or other cause, not the fault of the contractor, the said officers shall make a survey of the amount relaid, which shall be paid for by the corporation at such price as they may deem just.

Fifth. The contractor must commence the work on or before the 15th of May, 1871.

Sixth. Payment will be made by assessments upon the different owners of property, the corporation of Washington, and the Washington and Georgetown Railroad Company, as provided by law.

M. G. EMERY, *Mayor.*
GEO. W. LINVILLE.

Witness: M. PECHIN.

Specifications for sewers in the seventh ward, in accordance with amended act, approved March 28, 1871.

36 Main sewer to be in accordance with law.

Laterals to be eighteen inches diameter in the clear.

Brick to be hard made, hard tempered, clear, and thoroughly burned, bats or shattered arch-brick to be excluded. The bricks to be well wetted before being laid. Every brick must have full mortar-joints under bottom, and at sides and ends to be neatly and truly laid by line, and the joints to be carefully struck on the inside.

Mortar to be of fresh hydraulic cement and sharp river-sand, in the proportion of two parts sand to one part cement, and made in quantities for immediate use.

Man-holes, round, with cast-iron head, of such dimensions as may be directed, with wrought-iron steps; to be built from bottom with
37 nine-inch brick walls, with openings worked in for the connection of the sewer; the walls, if square, to be coped with four pieces of rough-hammered granite, nine inches thick, halved together at the ends, of such length that they will inclose a space of three feet in the clear, clamped together on the outer side, and rabbetted on the inner sides to receive an iron grating, the bars of which shall be wrought iron, one inch square and one inch thick.

Traps to be the same size and shape and of the same kind of material as the new trap at the War Department grounds, corner of Seventeenth street west and Pennsylvania avenue, or Twelfth street west.

Drops.—The walls of the drops to be covered with a circular cover of iron or stone for the protection of walls, and also an iron grating similar to that described for man-holes.

In executing the work not more than three hundred feet is to
38 be opened at one and the same time, and before any part shall be covered in the same shall be inspected. The trenches must be well rammed and puddled as refilled. All streets which may be disturbed in the execution of the work must be repaired, regraded, or otherwise repaired to the satisfaction of the inspector, ward commissioner, and assistant commissioner. All expense of pumping, damming, or any other loss or damage, which may arise from the nature of the work, or in connection therewith, from any cause whatever, to any person or persons, vehicle or vehicles, animal or animals, or to any gas or water pipes, must be borne by the contractor.

The price per linear foot for main sewer and laterals, each, for man-holes, drops, and traps, shall include all excavations, and making good all work which may be disturbed. The expense of constructing the main sewer to be paid for by assessment on the property bordering.

39 The laterals, man-holes, drops, and traps and thimbles to be paid for out of the ward-fund. The grade for the sewer shall be established by the superintendent and inspector.

WILLIAM FORSYTH,
Superintendent and Inspector.

Approved.

M. G. EMERY, *Mayor.*

Proposals.

WASHINGTON, D. C., *March* 30, 1871.

Hon. M. G. EMERY, *Washington, D. C.:*

SIR: I propose to lay the sewer-pipes on Seventh street, southwest,

from Virginia avenue to the river, in accordance with the amended act approved May 9, 1870, as follows:

For eighteen-inch pipe, with house-connection', $3.68 per lineal foot.

For twelve-inch lateral pipe, $3.12.

40 For necessary man-holes, $100 each.

For necessary traps and drops, complete, $147.

I further propose to pave the carriage-way of Seventh street, southwest, from B to Water street, southwest, in accordance with the act approved June 10, 1870, with the Follansbee wooden pavement, for the sum of $3.10 per square yard; and I hereby agree to do all necessary grading, and furnish sand, gravel, &c., to make the pavement complete, for seventy cents per square yard.

Assessments shall be made for the work for each square whenever the sewer-pipes shall be complete, and in the same manner for the paving.

Respectfully yours, &c.,

GEO. W. LINVILLE.

This proposition is accepted, and you are hereby authorized to commence the work at once.

M. G. EMERY.

41 *The instructions.*

OFFICE ENGINEER, BOARD OF PUBLIC WORKS,
Washington, D. C., July 3, 1871.

GEORGE W. LINVILLE, Esq., *Contractor:*

SIR: You will build the sewer in Seventh street, southwest, in the following manner, viz: From the canal to G street, put down 18-inch Scotch-pipe on both sides of the street; from L street to the point where the sewer discharges into the river build a brick sewer of six feet inside diameter.

A plan showing where to place the necessary drops and man-holes, also showing the house-connections, will be furnished you. You will commence the pavement on the south side of M street on a line with the ferry-house, and run from thence to north side of B street, southwest.

By order of the Board of Public Works,

WM FORSYTH,
First Ass't Engineer, Board of Public Works.

42 *Summons to answer.—Issued Sept.* 11, 1872.

In the supreme court of the District of Columbia, September 11th, 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Equity docket, 12.

The President of the United States to the District of Columbia, Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, Samuel P. Brown, composing Board of Public Works, and George W. Linville and Albert Gleason, defendants.

You are hereby commanded to appear in this court, at its first special term occurring twenty days after service of this subpœna, and answer

the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

43 *Restraining-order.—Issued Sept.* 11, 1872.

An original bill praying an injunction to restrain the defendants, as prayed in said bill, is this day filed. Hearing is fixed for 18th day of September, 1872, at 11 o'clock a. m.

By order of the court.

D. C. HUMPHREYS,
Justice, &c.

Marshal's return.

Summoned all, and served copy of injunction on all, by W'm A. Cook, acknowledging service as attorney for all.

A. SHARP,
Marshal.

SEPT. 11th, 1872.

Affidavit of Q. L. Page in support of bill.—Filed Sept. 19, 1872.

COUNTY OF WASHINGTON,
District of Columbia, to wit:

I, Quincy L. Page, on oath, say that I am a resident of the city of Washington aforesaid, and am well acquainted with the improvements—wood pavements and sewer—recently made on Seventh street, southwest.

44 I further depose and say, that bed of said street was very unevenly graded for the foundation of said pavement. I saw no gravel nor sand put. There was stuff placed there—a sort of loam. It was little more than mud, and placed there, I suppose, for sand. The bed, as prepared for said pavements, was neither rammed nor rolled. The cement used in constructing the man-holes of said sewer was very inferior, easily permitting water to run through it. The earth as it was filled in the sewer-trenches was neither puddled nor rammed that I ever saw. I saw the work every day during its progress.

The old material, consisting of New York flagging, cobble-stone, and brick, was, in my opinion, of equal value with the new material now laid. The flagging generally had only been laid a short time.

QUINCY L. PAGE.

45 Sworn to and subscribed before me this 18th day of September, 1872.

E. L. SCHMIDT, *J. P.* [SEAL.]

Affidavit of Louis C. Gury, in support of bill filed Sept. 19, 1872.

DISTRICT OF COLUMBIA, *to wit:*

I, Louis C. Gury, on oath, say that I am a resident of the city of Washington, in said District. My place of residence is at No. 4 9

Seventh street southwest. I am by occupation a clerk in the Post-Office Department, and during leisure hours, before going to my office in the morning, and after my return therefrom in the afternoon, I had ample opportunity, during the progress of the improvements upon said street, to observe closely the manner in which they were being conducted. This opportunity I availed myself of, and paid close attention as said improvements progressed. Having seen the manner in which wood pavements are laid in Chicago and other cities in the West,
46 I should unhesitatingly consider that the citizens of those places would think it a waste of money to pay for a pavement laid in the mode that the wood pavement on Seventh street is laid. They would not allow such a pavement to be put down. The foundation of the said pavement is defective. Nature had provided a better bed for it than the one that has been placed for it. The earth that was carted away was better adapted to the purpose of a foundation for said pavement than the material deposited for such purpose. The latter consists simply of earth hauled from other streets or embankments, and there is neither sand nor gravel laid under said pavement at any point along said street.

There was no rolling done on any part of the work from Virginia avenue to the river, neither was the earth rammed. Instead of
47 being rolled, the leveling was done by means of a rude scraper made of a joist, to which were affixed iron handles, the whole being drawn by a couple of workmen over the bed of said street.

The earth, as it was refilled in the sewer, was neither rammed nor puddled, and has consequenty subsided from time to time considerably.

The square I reside upon is No. 435. The sidewalk on both sides of the street, together with the curbing, were taken up and new sidewalks and curbing relaid. There was no necessity for this change, since the former sidewalks were perfectly good, and quite as perfect as the one' now laid. The old material, which I consider quite as valuable as the new, was taken away, and we are allowed no credit for it.

LOUIS C. GURY.

48 Sworn to and subscribed before me this 18th day of September, 1872.

E. L. SCHMIDT, *J. P.* [SEAL.]

Affidavit of J. T. Cassell.—Filed Sept. 19, 1872.

DISTRICT OF COLUMBIA, *to wit:*

I, John T. Cassell, on oath, say that I am a resident of the city of Washington, in said District, and reside at the corner of Seventh street southwest and Maryland avenue, in said city. The property owned by me on said Seventh street fronts one hundred and thirty feet on said street, from B street south to Maryland avenue, was paved with cobble-stones, (carriage-way,) for the cost whereof, opposite my premises, half of the width of the street, exclusive of the railroad company's property, I paid nearly three hundred dollars. At the time the recent improvements were projected on said street said cobble-stone pavement was in very good condition, it having been an excellent piece of work. The materials, however, composing it was removed to give place to
49 the wood pavement now laid, and no part thereof whatever, either in specie or value, credited to me or the other holders of property abutting thereon. The lowest estimate, in my judgment, of the value of said cobble-stone and the sand thus removed from the half of

said street in front of my said premises, and for which I conceive I should be credited, is one hundred dollars.

The wood pavement in front of my said premises was certainly not rolled and not rammed. It is in one place now in a very bad condition. The sewer-trenches, as filled in, were neither rammed nor puddled.

J. T. CASSELL.

Sworn to and subscribed before me this 18th day of September, 1872.

E. L. SCHMIDT, *J. P.* [SEAL.]

50 *Affidavit of W'm B. Browne.*

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, William B. Brown, on oath, say that I am a resident of the city of Washington, in the District of Columbia. My residence is at the corner of F and Seventh streets southwest, in said city.

I am well acquainted with the character of the work performed in making the recent improvements upon said Seventh street southwest, and have had frequent occasion, during the progress of said improvements, to observe closely as well the manner of constructing the sewer in said street as laying the wood pavement thereon. I further say that the earth so filled in said sewer was neither puddled nor rammed, and in condition of the dry and lo'se condition in which it was thrown in and permitted to remain, it has settled to such an extent as to necessitate heavy expense in relaying the wood pavement immediately above and upon said sewer.

51 I further depose and say that the bed of said wood pavement consists of coarse gravel, sand, and earth mingled together in the condition in which it was dug from the bank, and that in no place along the line of said street, so far as affiant has observed and believes, does said said and gravel, combined as aforesaid, exceed three inches in depth; and, further, I depose and say that the material so composing as aforesaid the bed of said wood pavement was neither rammed nor rolled.

W'M B. BROWNE.

Sworn and subscribed to before me this 17th September, 1872.

E. L. SCHMIDT, *J. P.*

52 *Affidavit Job E. Crampton.*

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, Job E. Crampton, on oath, say that I am a resident of the city of Washington, in said District, and I live on Seventh street southeast, between G & H streets south.

The sidewalk in front of my premises was taken up and the same material relaid, and I consider that the said sidewalk was in a far better condition before being relaid than it is now. Notwithstanding the fact that the old material is relaid, I find that I am not credited therewith, but am charged as for new work and materials. The sewer north of said G street consists of tile 18 inches in diameter. At said G street (north side) said sewer is of brick, three feet diameter in the clear, and so continues until it reaches L street, where the dimension is increased to six feet in the clear.

53 The wood pavement is very imperfectly laid. It is at this day uneven in surface throughout the greater part of its extent, the bed therefor not having been rammed or rolled. The surface over said sewer has sunk, here and there, over the whole line thereof, and the pavement has been taken up in consequence and relaid, in some instances several times. At the corner of Virginia avenue and said Seventh street, in particular, said pavement over the sewer has been taken up and relaid three times because of the sinking of the earth in said sewer-trench.

JOB E. CRAMPTON.

Sworn to and subscribed before me this 18th day of September, 1872.
E. L. SCHMIDT, *J. P.* [SEAL.]

54 *Affidavit of J. D. Hutton.*

COUNTY OF WASHINGTON,
District of Columbia, to wit:

I, J. D. Hutton, on oath, say that I reside in the city of Washington, in said District, and know the character of work done upon the improvements recently made on Seventh street southwest. I am by occupation bricklayer and builder. My place of residence is on said Seventh street southwest.

The excavation made for the reception of the bed of the wood pavement was not sufficient, in the first place. Not a load of sand proper for the purpose—not a load of what I would call sand—was laid on any part of said street; nor did I see a load of gravel on the street. The stuff that was placed under the said pavement became mud when rendered the least moist. I have seen other pavements laid, but I consider this to have been by far the worse and most inferior job that I have ever had knowledge of.

55 The earth on the sewer-pipe was not puddled nor rammed properly.

Old material, in every respect good, and equal, in my judgment, to what has been substituted, was taken up, carried away, and not credited to us. The flaggings across said Seventh street, at all street-intersections, were taken off and laid elsewhere.

The brick used in constructing the sewer, instead of being hand-made, as should have been the case, were the most common kind of what is called patent brick, such trash as I have never known permitted to be used in making sewers. The workmanship is good enough, but the materials furnished by the Board of Public Works was little better than worthless.

JACOB D. HUTTON.

Sworn to and subscribed before me this 18th day of Sept'r, 1872.
E. L. SCHMIDT, *J. P.* [SEAL.]

56 *Demurrer of the Board of Public Works.—Filed Sept.* 19, 1872.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } 2910. Equity.

The separate demurrer of Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia.

These defendants, by protestation, not confessing any of the matters

and things in and by said bill of complaint to be true in manner and form as the same are set forth, say that it appears that the said bill is exhibited by George Mattingly, in connection with the other complainants, for several and distinct matters and causes, in many whereof, as appears by the said bill, the said complainant Mattingly has no interest in common with the other complainants; and, by reason of such
57 distinct matters, the said bill is drawn to considerable length, and these defendants are compelled to be put at charges in respect thereof; and, by joining distinct matters and distinct parties which do not depend on each other, and whose interest' are not common or identical, the proceedings in the progress of said suit will be intricate and prolix, and these defendants be put to unnecessary charges and expenses.

Wherefore, these defendants demur thereto, and humbly pray the judgment of this honorable court whether they are compellable or ought to make any answer thereunto otherwise than as aforesaid; and these defendants humbly pray to be hence dismissed with their costs and charges most wrongfully sustained.

H. D. COOKE.
ALEX. R. SHEPHERD.
JAS. A. MAGRUDER.
A. B. MULLETT.
S. P. BROWN.

58 Alex. R. Shepherd, one of the defendants, being duly sworn according to law, says that the foregoing demurrer is not interposed for the purpose of delay.

ALEX. R. SHEPHERD.

Subscribed and sworn to before me this 18th day of September, 1872.
JOHN F. COOK, *J. P.*

I certify that, in my opinion, the foregoing demurrer is well founded in matter of law.

WILLIAM A. COOK,
Solicitor for Board of Public Works.

59 *Demurrer of the Board of Bublic Works for want of equity.—Filed Sept.* 19, 1872.

In the supreme court of the District of Columbia, this 10th day of September, 1872.

GEORGE MATTINGLY
vs.
THE DISTRICT OF COLUMBIA, BOARD OF PUBLIC WORKS, et al. } 2910. Equity docket 12.

The separate demurrer of Henry D. Cooke, Alexander R. Shepperd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and composing the board of public works of the District of Columbia.

These defendants, by protestation, not confessing any of the matters in and by said bill complained of to be true in manner and form as the same are set forth and alleged therein, to so much of said bill is contained in the fourth paragraph thereof, and to any and all parts

thereof containing similar averments, and seeking relief and an
60 injunction, by reason thereof, demur to the said paragraph, being as follows:

"4. The complainants, being so seized and possessed as aforesaid, have been assessed by the said The District of Columbia and by the aforesaid Board of Public Works certain specified sums of money on account of certain alleged improvements, sewerage, and paving constructed, or alleged to have been constructed, on said Seventh street west, adjacent to and in front of lots of ground and premises aforesaid of the complainants, and they have been notified by the said Board of Public Works and its officers and agents that said lots of ground have been assessed for such special improvements at the rate of eight dollars and seventy-four $\frac{41}{100}$ cents ($8.74 $\frac{41}{100}$) per foot for each and every front foot of the said lots, being in all the sums set opposite to the names of the complainants, respectively, in the schedule hereinbefore men-
61 tioned, marked 'Complainants' Exhibit No. 1,' and the defendants have notified the complainants, individually and severally, that in case of the neglect or refusal of the complainants to pay the amounts so as aforesaid assessed against them, the said Board of Public Works, after the expiration of thirty days, will immediately issue certificates of indebtedness against the aforesaid property of the complainants, which assessment and certificate are declared to be a lien upon the said property and lots of ground, in pursuance of a certain act of the legislature of the District of Columbia approved August 10, 1871, of which said notice and act of the legislature a copy is herewith annexed, marked 'Complainants' Exhibit No. 2,' and made part of this bill. And the complainants are further notified in and by the said notice that if the said assessment, with interest at the rate of ten per cent., should remain unpaid for one year, the said Board of Pub-
62 lic Works, upon the application of any holder of any of the said certificates, shall proceed to sell the said property or a proper part thereof."

And, for cause of demurrer thereto, they say that if said matters and things contained in said paragraph and referred to therein, as aforesaid, were true, they present no matter of equity whereon this court can ground any decree or give the plaintiffs any relief as against these defendants, or any of them. Wherefore, these defendants humbly crave the judgment of this honorable court whether they are compelled to make any answer thereunto otherwise than as aforesaid, and these defendants humbly pray to be hence dismissed with their reasonable costs and charges most wrongfully sustained.

H. D. COOKE,
JNO. A. MAGRUDER,
S. P. BROWN,
ALEX. R. SHEPHERD,
A. B. MULLETT,
Board of Public Works.

63 Alex. R. Shepherd, being duly sworn according to law, deposes and says that the foregoing demurrer is not interposed for the purpose of delay.

ALEX. R. SHEPHERD.

Sworn and subscribed before me this 18th day of September, 1872.
JOHN F. COOK, *J. P.*

I certify that in my opinion the foregoing demurrer is well founded in matter of law.

WILLIAM A. COOK,
Solicitor for Defendants, Board of Public Works.

SEPTEMBER 19, 1872.

64 In the supreme court of the District of Columbia the day of September, 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA, THE BOARD OF Public Works, et al. } In equity. No.

The separate answer of the Board of Public Works to the part of said bill not demurred to.

Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullet, and Samuel P. Brown, constituting and composing the Board of Public Works, now and at all times hereafter reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much
65 or such parts thereof as these defendants are advised is material for them to answer unto, say:

First. They admit, on information and belief, the residence of the plaintiffs and their interest in the real estate as set forth in the said bill, but they deny that they possess an identity of interest in said property, and they aver that they are separate owners thereof, with no common interest in the amount of assessments against them or their property, and that in the absence of such interest they cannot be united as complainants in said bill.

Second. They admit that they constitute and compose the Board of Public Works of the District of Columbia.

Third. They admit, on information and belief, that the com-
66 plainants are owners of real estate as set forth in the third paragraph of said bill.

Fourth. They admit that assessments have been made against the property of said complainants for improvements, including sewerage and paving on Seventh street west, adjacent to and in front of lots of the complainants, and that the complainants have been notified thereof by said board; but they deny that this has been done by the District of Columbia, and they aver that under and by virtue of the act of the Congress of the United States entitled "An act to provide a government *of* the District of Columbia, approved February 21, 1871, and an act of the legislative assembly of the District of Columbia entitled "An act prescribing the mode of assessment for special improvements, and providing for the collection thereof," approved August 10, 1871,
(Acts and Resolutions of the 1st Session of the Legislative Assem-
67 bly of the District of Columbia, page' 31, 32,) said assessment can only be made by the Board of Public Works, and the District of Columbia has no connection therewith.

They admit that said assessments amount to eight dollars and seventy-four and $\frac{41}{100}$ cents (8.74\frac{41}{100}$) per front foot of the said lots, and that the complainants have each been notified that in case of the neglect or refuseal to pay said amount the said board will proceed, after the expiration of thirty days, to issue certificates of indebtedness against the said

property of the complainants, which said notices were given on or about the 14th, 15th, 16th, and 17th days of August, 1872.

They admit that said certificates, if issued, would be a lien on said property to the amount thereof as assessed against each of said
68 lots, but not against them jointly or otherwise than to the extent of the improvements made and assessed against each separate piece of ground; and it is averred that said assessments are of themselves no lien upon said lots, nor can any lien therefor be created or arise except by the refusal or neglect of said complainants to pay said assessments for said improvements, in which event only certificates of indebtedness can or will be issued.

They further admit that if said certificates should be issued, they would bear interest at the rate of ten per cent. per annum, and that if they should remain unpaid for one year, said board, upon application of the holder, would be compelled to sell the property against which said certificates were issued, or so much thereof as would be necessary to pay the same, as will more fully appear from the act of the legisla-
69 tive assembly of the District of Columbia of August 10, 1871, (Acts and Resolutions of the 1st Legislative Assembly, pp. 31 & 32.)

Fifth. They admit the allegations contained in the fifth paragraph of the complainants' bill in relation to an ordinance of the late corporation of Washington for the construction of a sewer on Seventh street west from Virginia avenue to the Potomac River, and for a Follansbee wooden pavement on said street, and that a contract for said work was entered into with George W. Linville, a copy of which is annexed to said bill as Exhibit No. 4.

Sixth. They admit that said Linville entered upon the performance of said contract, and that after he did so the charter of said city was repealed, and in lieu thereof a government was established, as per said act of Congress of Feb'uary 21, 1871, but they deny that by vir-
70 tue of said act the District of Columbia suc'eeded to all the rights and privileges of the mayor, the board of aldermen, and the board of common council of the city of Washington, and that thereupon and thereby the board of public works assumed the control and direction of said sewer and paving; and they aver the fact to be that the charter of said city was continued for the enforcement of all legal contracts, without designating any person to see to their execution, all the officers of said corporation having ceased under said act of Congress to exist, and the Board of Public Works, in the 37th section of said act, was expressly given the entire control of the streets, avenues, sewers, and alleys of the city of Washington, thus placing said board in the sole charge, among other things, of all finished as well as commenced sewers and pavements, and by virtue of an act of the Congress of
71 the United States entitled "An act making appropriations to supply deficiencies in the appropriations for the service of the year ending June thirtieth, eighteen hundred and seventy-one, and for additional appropriations for the service of the year ending June thirtieth, eighteen hundred and seventy-two, and for other purposes," approved April 20, 1871, the said improvements on 7th street were required to be assessed against private property as provided in the act of February 21, 1871, to wit, on adjoining, and especially benefited property in such mode as the District legislature should prescribe, and they aver that the cost of said work of which the complainan s complain in their bill has been assessed by virtue of said act and authority and in accordance therewith, and not otherwise, and in all respects

correctly, as will more fully appear by reference to the affidavit of William Forsyth, which is filed herewith as Exhibit A.

72 Seventh. They admit that they ordered the dimensions of the sewer to be changed, but they deny that this was done illegally, and without any warrant of law, or contract therefor.

And they aver the facts to be that after they were appointed members of the Board of Public Works and entered on the discharge of their duties, and inspected said work, they became convinced that the sewer provided for in the contract of said Linville with the late corporation of Washington would be inadequate for the drainage in the locality where it was to be constructed; and after full and careful consideration they changed the dimensions, as set forth in Exhibit No. 4 of complainants' bill. The said George W. Linville assented to the necessary modifications of his contract, and agreed with said board to perform the new work accordingly, and to construct the sewer according to the

73 new dimensions instead of the old, as will fully appear by reference to the records of said board.

And they aver that the change in the dimensions was wise and judicious, and that while not greatly, but to some extent, it enhanced the li'bilities of the complainants, it was of great and increased benefit to them and the locality in which it was constructed, and they submit that their action in this respect was just and legal; and on this point they refer to the affidavit of William Forsyth, above named, and to paragraph 12 of the answer of their co-defendant, Albert Gleason.

Eighth. They deny that the work of said sewer, pavement, and other work referred to in the 8th paragraph of said bill, was badly done in many parts, and they deny the correctness of the several specifications

74 therein in respect to the character of said work, and especially that the same will last but a brief time, and the complainants be subject to further cost and assessments for the repairs thereof; and they aver that the work was car'fully done, under regular inspection, and with a view to make it in all respects good and sufficient for the purposes thereof, and that it will require only such incidental repairs as is common to such work.

Ninth. They deny each and all of the allegations of the 9th paragraph of complainants' bill.

Tenth. They admit that some of the complainants called for a bill of items of the assessments against their property, but they deny that under any law in relation to the duties of the Board of Public

75 Works such bills can be demanded as a matter of right; nevertheless, anxious to furnish all possible information, and it being difficult, consistently with their other duties and engagements, to furnish such bill of items to each one who might request the same, they did so by a letter addressed to a committee requesting the complainants, under date of August 28, 1872, in which all items were contained, and which was published in the National Republican of August 29, 1872, as well as in the Evening Star, and a copy of which is annexed to complainants' bill as Exhibit No. 4.

Eleventh. On their personal knowledge, as well as on their information and belief, they deny that said assessments are fraudulent, excessive, and illegal, either in whole or in particulars, and that any part thereof is without warrant or authority of law; and they aver that

76 $577 for superintendence was for the necessary supervision and inspection of said work as it progressed, which sum was actually paid therefor; that the addition of $11\frac{43}{100}$ cents per front foot was necessary in consequence of the exemption of church and school prop-

erty from such assessments, which said exemption will appear by reference to the act of Congress entitled "An act exempting from taxes certain property in the District of Columbia, and to amend the act to provide for the creation of corporations in the District of Columbia by general law," approved June 17, 1870, the first section of which is as follows: "Be it enacted, &c., that from and after the passage of this act, all churches, and school-houses, and all buildings, and grounds, and property appurtenant thereto and used in connection therewith, in the District of Columbia, shall be exempt from any and all
77 taxes and assessments, national, municipal, or county," as well as by the act of Congress aforesaid, of April 20, 1871, requiring the said assessments to be made on private property.

They deny that the sum of $7,879.16, or five per cent. on the total cost, is arbitrarily added to said assessment; and they aver that said sum was necessary for the contingent expenses of said work, including engineering and other matters essential to the carrying on of the same, and customary in the execution of similar work, and they aver that only one-third of said contingent expenses, viz, $2,626.38, or one and two-thirds per cent., instead of five per cent., on the total cost has been included in said assessment, and that this was necessary in order that one-third of the entire cost of said improvement should be charged to and collected from the property adjacent to and benefited by said improve-
78 ment, as provided and required by law. And they deny that each lot should only be charged with its own special improvements, or with the authorized proportional share of the cost of the improvements immediately adjoining thereto, and they submit that both by the act of Congress of Feb'uary 21, 1871, as well as by the said act of the legislative assembly of August 10, 1871, the property adjoining, as well as that especially benefitted by the improvement, may be charged with a reasonable proportion, not exceeding one-third, of the cost therefor, and they aver that the assessments afor'said have only been made against property adjoining said improvements and specially benefited thereby, and not otherwise.

They deny that the said assessment includes curbing of the street and paving the sidewalks, which was wholly unnecessary and uncalled for by the condition of said curbing and sidewalks, and that lots of
79 the complainants remote from the said curbing and paving, and in no way benefitted thereby, have been specially assessed therefor in said assessment; they deny that certain work alleged to have been done by Albert Gleason was done without warrant, but they aver that they made a valid contract with said Gleason for the work done by him, as will appear by said contract, dated October 14, 1871, and on file among the records of said board, and also in the office of the secretary of said District.

They aver that the six-foot sewer along Water street was necessary in order to afford the proper outlet for the sewerage of 7th street, and that the same only extended about one square in order to afford such outlet to the river, and that without it the sewer on 7th street would have been overcharged, to the great detriment of the property along said street, and was made by agreement between the said board
80 and said Geo. W. Linville, as will fully appear by reference to the records of said board, and was properly chargeable to the property on said 7th street. In relation to the necessity for said sewer, they refer to the affidavits filed therewith and marked "Exhibit A," and to the answer of Albert Gleason.

They deny that old materials, curbing, cobble-stone, and brick of

good value was removed and taken away by the defendants or their agents, or employees, to their or any of their own private use and profit, and they aver that so much of the old material as was fit for use was used in said work, and no charge made therefor against the property of the complainants. They deny that various charges for portions of said work, as started in Exhibit 4, are extravagant and excessive, and that said work has been very considerably overmeasured, and aver that it was fairly and accurately measured by William Forsyth, the sur-
81 veyor of the District of Columbia, and they refer in this connection to his affidavit filed herewith and marked "Exhibit A."

Eleventh. They deny that there are inaccuracies and irregul'rities in said assessments, and that they are wholly illegal, unjust, and without warrant of law, and that said assessments were fraudulent and wrongfully levied, with purpose and intent to defraud and injure these complainants, and to deprive them of their just rights in the premises, and they aver that they have been properly and legally and fairly made, and that the property of each of said complainants has been benefitted to the full extent of the amount assessed against it for said improvement.

Twelfth. On their personal knowledge they deny that they, either individually or collectively, combined or confederated with
82 said Linville and Gleason to defraud the complainants and the people of the District of Columbia, and that they permitted and authorized the said Linville and Gleason to do the aforesaid work in an imperfect manner, in violation of any contract, and to impose unlawful assessments upon the complainants, and to convert the proceeds thereof to their own private use and emoluments. They deny that they have converted materials for curbing, bricks, and other things to their own use, or taken them away from said street for their own profit, and they aver that all of such charges and allegations are without the least foundation in fact, utterly reckless, and purely malignant.

Thirteenth. They deny all and every allegation in the plaintiffs' bill contained not herein before admitted or denied.

83 Fourteenth. And in further denial of the statements of the said bill, and that the court may become fully acquainted with the facts of the case, and the true character thereof, they say that all which they did in connection with said work was done for the interests of the property of the complainants and the welfare of the public in said vicinity. That no private purpose or gain controlled or influenced them in any respect; that said work was commenced and openly and publicly carried on for about six months by able and experienced contractors and workmen; that this was done in the neighbourhood of the residences of some of the complainants and under their daily observations, and with the full knowledge of all of them, and with the Board of Public Works and employees of easy access, and at all times ready and willing to receive suggestions or information concerning the mode in which
84 said improv'ments were being made; that during all this time none of the complainants complained to said board of the plan of said work or of the modifications and additions to the original contract between Linville and the late corporation of Washington, or of the manner of the execution of the work, or presented any objection thereto; that, on the contrary, as far as possible, said complainants acquiesced in the execution of said work, which was completed on or about the month of Dec., 1871, and that it was only after they were regularly and properly assessed for the same, that they objected to the cost thereof, and presented their said bills with the avowed purpose of escaping and evading payment therefor, either in part or in whole; and these defendants

respectfully submit that after such laches and acquiescence as aforesaid it would be manifestly against good conscience and equity to now
85 allow them to attain the purpose of their said bill, and to possess the advantage of said improv'ments without paying the cost thereof, and thus to embar'ass the said board in the performance of its duties, and to deprive it of means justly due from said complainants, and necessarily needed in order to carry on and complete essential improvements in said District.

Fifteenth. And they further say that the entire cost of said improvements refer'ed to and mentioned in said bill is one hundred and fifty-seven thousand five hundred and eighty-three dollars and thirty-four cents, ($157,583.34,) leaving, after deducting $24,914.79 charg'd to the United States, the Washington and Georgetown Railroad Company, and other items, the total cost $140,547.71, one-third of which, $46,849.27, only is charged or assessed against private property adjoining and espe-
86 cially benefited by said improvements, and $20,109.30 against the seperate property of the complainants named in the bill, and the balance of $26,739.93 against the other property adjoining and especially benefited by said improvements, of which $1,424.02 has been paid.

Having fully answered said bill, we pray the same may be dismissed, and the temporary injunction dissolved, with costs, etc. And they will pray, etc.

87

H. D. COOK'.
JAMES A. MAGRUDER.
ALEX. R. SHEPHERD.
S. P. BROWN.

WILLIAM A. COOK,
Sol. for Def't.

DISTRICT OF COLUMBIA, *ss:*

I, Alexander R. Shepherd, one of the defendants aforesaid, do solemnly swear that I have heard read this answer by me subscribed, and know the contents thereof, and that the facts therein stated positively or upon personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

ALEX. R. SHEPHERD.

Sworn and subscribed before me this 18th day of September, 1872.

BENJAMIN*E* N. MEEDS,
Notary Public.

88 *Affidavit of W'm Forsyth.—Filed Sep.* 19.

In the supreme court of the District of Columbia.

GEO. MATTINGLY ET AL.
v.
THE DISTRICT OF COLUMBIA, THE BOARD OF Public Works, et al.

William Forsyth, on oath, states:

I am the surveyor of the District of Columbia. I made the measurements upon the Seventh-street improvement set forth in the printed statement filed as Exhibit No. 4 to complainants' bill. Said measurements were carefully made, and are true and are accurate. I have a general knowledge of the work done on said improvement from frequent

observation of the same, and I believe it to have been done in an honest, workmanlike, substantial, and durable manner, equal to
89 any work of a similar kind ever done under the old corporation of Washington. The sewer between L street and the river is in the inside diameter five feet and six inches. If it had been of less dimensions the sewer on 7th street, both north & south of L st., would have been overcharged, and the property adjoining much damaged. By construction of said sewer of its present dimension said property has been much benefited. The change made in the dimensions and construction of said sewer I regard as wide, judicious, and absolutely necessary. I know that frequently, under the old corporation, such changes were necessary and were made.

W'M FORSYTH.

Subscribed and sworn to before me this 18th day of September, 1872.
JOHN F. COOK, *J. P.*

90 *Separate ans. of the Dist. of Col.—Filed Sep.* 19, 1872.

In the supreme court of the District of Columbia this 19th day of September, A. D. 1872.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity. No.

The separate answer of the District of Columbia to the bill of complaint of the above-named complainants, by its governor, Henry D. Cooke, and under its seal.

This defendant, saving and reserving to itself now and at all times hereafter all manner of advantage and benefit of exception to the many errors and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as he is advised is material for this defendant to make answer unto, answeres and says:

91 It denies that said complainants have been assessed by this defendant and by the Board of Public Works certain specified sums of money, or any sums whatever, on account of alleged improvements, sewerage, and paving constructed or alleged to have been constructed on Seventh street adjacent to and in front of the lots and premises of said complainants; and denies that said complainants have been assessed by this defendant on account of any improvements, sewerage, or paving whatever, as alleged in the 4th paragraph of said complainants' bill, or otherwise; and denies that it has given any notice to the complainants that in case of their neglect or refusal to pay the amounts assessed
92 against them the said Board of Public Works will issue certificates of indebtedness against the complainants' property, as alleged in said 4th paragraph of complainants' bill, or otherwise.

This defendant denies each and every allegation in said bill contained which charges that old material of any kind or description whatsoever was removed or taken away by this defendant or its agents, and denies that any material was converted by this defendant or its agents or employees to its or their own private use or profit.

And this defendant submits that it has no interest in said suit in the matter of the assessments against the complainants' property or in the certificates to be issued against the same by the Board of Public
93 Works in case the said assessments shall not be paid. And, further, that it is improperly made a party defendant in this case.

And this defendant prays that it may have the same benefit of this defence as if it had demurred to said complainants' bill, and to be hence dismissed with costs and charges in this behalf most wrongfully sustained.

[SEAL.] H. D. COOKE,
Governor.

94 *Separate ans. of Albert Gleason.—Filed Sep.* 19, 1872.

In the supreme court of the District of Columbia, the 18th day of September, 1872.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity. No. .

The separate answer of Albert Gleason, one of the defendants in the above-entitled cause, to the bill of complaint filed and exhibited therein.

This defendant, now and at all times hereafter reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much or such parts thereof as he is advised is material for him to make answer unto, answering, says:

First. He admits the allegations contained in the first para-
95 graph of said bill, except that it is filed by the complainants in their own behalf and of all others similarly circumstanced who may come in and share the costs of this suit; and he denies that the complainants have been or are authorized to so file a bill in this court, and he submits that the combinations of interests presented in said bill are distinct and separate, and not such as will justify the complainants to unite as they have done.

Second. He admits the allegations of the second paragraph of the complainants' bill.

Third. He admits the allegations of the third paragraph of said bill upon information and belief.

Fourth. He possesses no knowledge in regard to the allegations
96 of the fourth paragraph of said bill, nor has he sufficient information to enable him to form a belief in relation thereto.

Fifth. He admits on information and belief the substantial averments of the fifth paragraph of the complainants' bill.

Sixth. He can neither admit 'or deny the allegations of the sixth paragraph of said bill, except so far as they relate to matters within the general knowledge of the people of the District, and as respects these he believes them to be true.

Seventh. In regard to the allegations of the seventh paragraph of said bill he has neither knowledge 'or information sufficient to enable him to admit or deny the same.

Eighth. He denies on his personal knowledge that the work of
97 the sewer, paving, and other work done of Seventh street west, from B street south to Water street, and referred to in this paragraph of the complainants' bill, was imperfectly and badly done in many particulars, and that it will last but a brief time, and the complainants be wrongfully and unjustly subjected to further costs and assessments on account of the imperfections thereof for the repair of said work.

And in further denial of the averments of this paragraph of said bill

he says, on his personal knowledge as aforesaid, that in the construction of said sewer the earth, as filled, was puddled and rolled and rammed; that the foundation of the pavement is of clay, free of loam, said foundation being an old, solid road-bed, which it would have
98 been improper and injudicious to have removed, and that on top of said clay foundation there was a good and sufficient layer of gravel, and the required amount of sand was placed thereon and properly rolled and rammed; and he denies that there was no systematic or proper inspection of the work, and he avers that it was regularly inspected each day during its progress by inspectors appointed and employed by the Board of Public Works; and he avers with regard to all the charges and complaints of the complainants' bill in this paragraph with regard to the character of said work that it was well and carefully done, and of good and proper material, and that there is no just
99 ground in connection therewith for the statements made by the complainants in this part of their bill.

Ninth. Having made no estimates of the cost of the entire work he is unable to state positively what it would amount to, and he cannot admit or deny the averments of the ninth paragraph of said bill, except that he denies, as in the preceding paragraph, that the work has been imperfectly and improperly done, as averred in said ninth paragraph.

Tenth. He has no knowledge of the allegations contained in the tenth paragraph of said bill, and can neither admit 'or deny the same.

Eleventh. He has no knowledge in relation to the assessments made against the complainants for work done on said street, nor in re-
100 lation to many of the statements contained in the 11th paragraph of said bill in relation thereto; but he denies that the curbing referred to in said paragraph was, as alleged, wholly unnecessary and uncalled for by the condition of the sidewalks, and he avers the fact to be that the curbing placed on said street was necessary in order to complete the paving of said street as required to be done. And he further avers that wherever the old curbing was fit to be used the same was used and reset, and no charge was made for the material; that some of the old curbing which was unfit to be used was taken by the property-holders along the line of the improvement and disposed of by them, among whom were several of the complainants, including
101 George Mattingly and B. Shea; and that he was informed and believes that said Mattingly and Shea disposed of the same to one Buckley.

He further avers that the new curbing used on said street was the best bluestone curb, and he denies that any work was done by him without warrant or due authority of law; and he avers that, on or about the 14th day of October, 1871, he contracted for the following work with the Board of Public Works of the District of Columbia, viz: To lay the sidewalks and gutter-ways to traps, and other work, on Seventh st. west, between B street south and the Potomac River, at and for the following prices, viz: New brick pavement, 80 cents per yard; re-
102 laying old brick pavement, 25 cents per yard; flagging-stones for crossings, 60 cents per square foot; new cobble-stones, 55 cents per square yard; gutter-flags, twelve inches, 35 cents per foot; gutter-flags, fifteen inches, 50 cents per foot; all cobble-stones, 30 cents per yard.

And he avers that all work done by him on said street was done by proper authority, as will appear by the papers and contracts on file in the office of the Board of Public Works, and to which, if necessary, he

prays leave to refer in detail as fully as if the same were herein set forth.

He denies that old materials, curbing, cobble-stones, and brick, which had been used in and upon said Seventh street in the paving of the carriage-way and sidewalks, and of good value, were removed and
103 taken away by him or any agent of his in the progress of the work, and converted by him or any agent of his to his own private use and profit; and he avers that said accusation is wholly groundless, and without any foundation in truth whatever; and he further avers that he bought some cobble-stones and twelve-inch flagging from property-owners along said street, and for which he fairly and honestly paid said parties; and, in addition to this, after lowering the railroad-track on said street, he received from the railroad company the cobble-stones taken up within two feet of said track; and that this is the only portion of the old material which in any way came into his possession or under his control.

104 Eleventh. Of the averments in this paragraph of the complainants' bill he has no knowledge to enable him either to admit or deny the same.

Twelfth. On his personal knowledge he denies that he combined and confederated in any manner with George W. Linville, or the District of Columbia, or the Board of Public Works, collectively or individually, to defraud the complainants, or any one of them, or the people of the District of Columbia, and that the members of said board have authorized or permitted him personally, or in connection with said Linville, to do so, or to do any part of the work on said street in an imperfect manner, or in violation of any contract therefor, or to impose unlawful assess-
105 ments on the complainants therefor, or to convert the proceeds of said work to his or their private use or emolument; and he further denies that he, as one of the defendants, has converted the materials referred to, to wit, curbing on said street, to his own use and profit, otherwise than to the extent to which he purchased the same, as set forth in a preceding paragraph.

And on his information and belief, as well as to some extent on personal knowledge and observation, he denies that any or either of his codefendants did so; and he avers that all the statements and accusations of this paragraph are false, injustifiable, and reckless, as well as manifestly wicked and malignant.

106 And in further explanation and denial, in order that the court may *may* be properly informed in the matter, he says that all work done by him on said street, and of which the complainants complain, was well and properly done, in a workmanlike manner, as fully as could be done in the latter part of the year 1871, and, if any repairs of said work are required, it will be only incidental to work of that character.

He further says that the prices received for said work were low and less than he received during the same season for corresponding work done for the corporation of Washington; and that on the whole work he lost a considerable sum in consequence of the lowness of the prices.

And he further says that he has been paid all that became due
107 him for said work, except five cents per square yard for the new brick pavement, which amount is reserved by the Board of Public Works as security for keeping the same in repair.

And he further avers that from his own personal knowledge and observation it was necessary, in order to properly sewer and drain said 7th street, to increase the dimensions of the sewer originally projected and contracted for therein, and that it was necessary to extend the sewer

about a square along Water street in order to obtain a proper outlet into the Potomac River.

And he further says that during the progress of the work done by him no complaint or objection was made to him or to his knowl-
108 edge by the property-holders on said 7th street as to the character of the work or the manner in which it was being performed.

And he prays to be hence dismissed with his reasonable costs in this behalf sustained.

ALBERT GLEASON.

S. R. BOND,
Sol. for Def't Gleason.

I do solemnly swear that I have heard read the answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe *I believe* to be true.

ALBERT GLEASON.

Subscribed and sworn to before me this 18th day of September, 1872.
JOHN F. COOK, *J. P.*

109 *Affidavit of J. F. Higgins, filed with ans'rs of Gleason and B. P. W.—Filed Sep.* 19.

In the supreme court of the District of Columbia, this day of September, 1872.

GEO. MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA, THE BOABD OF Public Works, et al.

James F. Higgins, on oath, states—

That he was the foreman of the work done on Seventh street; that said work was done in a substantial and workmanlike manner; that said work will be of great value to the property in the vicinity, and especially to the property of the complainants, and that said work was done under the superintendence of the Board of Public Works, and was regularly inspected each day as the work progressed by an officer of the said board, duly appointed for that purpose. That the
110 foundation for the pavement was of good clay, covered by a sufficient layer of gravel, and upon this was placed a layer of at least four inches of good sand, and that said gravel and sand were well and properly rolled and rammed, and that in the laying of the sewer the earth as filled was well and properly puddled and rammed.

He further says that he has superintended a great deal of work of similar character, and that said work on Seventh street was as good a job as any that he had ever superintended. That during the progress of said work none of the property-holders on said street or others made any complaint or objection to him, or in his hearing, as to the manner in which the same was being done, and that none of the old ma-
111 terial was taken away by any of the defendants in this action for their own use. That said material, when proper for the purpose, was reused for said work.

JAMES F. HIGGINS

Subscribed and sworn before me this 18th day of September, 1872.
[SEAL.] BENJAMIN N. MEADS,
Notary Public.

Separate ans. of Linville.—Filed Sep. 20, 1872.

In the supreme court of the District of Columbia, the 18th day of September, 1872.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity. No. .

The separate answer of George W. Linville, one of the defend-
112 ants in the above-entitled cause, to the bill of complaint filed and exhibited therein.

This defendant, now and at all times hereafter reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto or unto so much or such parts thereof as he is advised is material for him to make answer unto, answering, says:

First. He admits the allegations contained in the first paragraph of said bill, except that it is filed by the complainants in their own behalf, and of all others similarly circumstanced who may come in and share the costs of this suit; and he denies that the complainants have been or are authorized to so file a bill in this court; and he submits
113 that the combinations of interests presented in said bill are distinct and separate, and not such as will justify the complainants to *write* as they have done.

Second. He admits the allegations of the second paragraph of the complainants' bill.

Third. He admits the allegations of the third paragraph of said bill, upon information and belief.

Fourth. He possesses no knowledge in regard to the allegations of the fourth paragraph of said bill, nor has he sufficient information to enable him to form a belief in relation thereto.

Fifth. He admits that on the 30th of March, 1871, he entered into a contract with the mayor and board of aldermen and board of common council of the city of Washington for the construction of a sewer
114 in Seventh street west, from Virginia avenue to the Potomac River, and for paving said street from B street to Water street, as set forth in Exhibit of said bill.

This contract was made after the passage of the act of 21st February, 1871, creating the present government of the District, and after the nomination of the Board of Public Works by the President of *of* the United States, and their confirmation by the Senate on the 3d of March, and after they took the oath of office on the 16th of March, and entered on their duties. The question arose as to the validity of the contracts made by said city, after the 21st of February, 1871, after the appointment and qualification of the Board of Public Works; and on the 22d of May, 1871, the supreme court of this District in general term, as he is
115 informed and believes, decided such contract to be illegal.

That, anxious to carry out his work, he consulted with said board and inquired in writing what he should do, making the fact known that

he was willing to go on with said work with their assent, or to have the same modified, or to enter into a new contract. After some delay, the said board consented and agreed *and* to allow the paving part of said contract to go on and adopted the same, but determined to modify the part in relation to the sewer, and on the 3d of July W'm Forsyth addressed him an order, which is annexed hereto, Exhibit G. W. L., No. 1.

To this no immediate response was made or formal acceptance; but on the 12th of July I assented and agreed to the said proposition of
116 the Board of Public Works, which was also contained in said order, and addressed them a letter, of which a copy is hereto annexed as Exhibit G. W. L., No. 2, and proceeded with the said work accordingly.

On the 4th of August he afterwards was directed to have all lateral sewers and openings properly constructed and connected with the 7th-street sewer; also, gas and water connections made, and he assented and agreed thereto, as will appear from a communication addressed to said board on the 7th of August, and said work was accordingly done, as will more fully appear by Exhibits G. W. L., 3 and 4. Subsequently, on the 11th of December, he was directed to have foot-crossings placed at 7th street, foot of L street; also, sidewalks from the intersection
117 to the point at which wooden pavement exists on Water street, and Scharf pavement for brick walks; and in a letter to said board, dated December 13th, he agreed to do said work at board prices, as will appear by reference to Exhibit No. 5, filed herewith, the said board having established a list of prices for the various classes of work.

Under these various writings he proceeded in good faith to execute all of said work. All the directions from said board were in writing, and he is informed and believes copies, or duplicates, are on file among the records of said board, and without such writings and agreements he did no part of said work; and, to show and explain the plan of said work, he refers to the plan or diagram hereto filed as Exhibit G.
118 W. L., No. 6, and the affidavit of W'm Forsyth, explanatory thereof, as well as to the affidavit of Jno. G. Stephenson.

Sixth. He can neither admit 'or deny the allegations of the sixth paragraph of said bill, except so far as they relate to matters within the general knowledge of the people of the District, and as respects these he believes them to be true.

Seventh. He admits that the said Board of Public Works, by an order dated July 3d, 1871, direct him to construct said sewer in a different manner and of different dimensions from those provided for in said contract, and that he, in compliance with said order, constructed said sewer accordingly.

But he denies that said board gave said order illegally or with-
119 out any warrant of law, and denies that he did said work without the valid contract entered into with said b'ard. He admits that the cost of said sewer was to some extent enhan ed by said change in its dimensions, but to what extent he is not informed; but denies that the liabilities of the complainants were unjustly or unwarrantably increased, and says that their property was enhanced in value to the full extent *extent* of such increased cost; and he further says, of his own knowledge, that said sewer as originally projected and contracted for was not of sufficient size to afford proper drainage, and would have been a positive detriment to the property entended to be drained, as it would have become overcharged, and have thus produce' serious injury,
120 and a larger sewer would eventually have had to be laid.

Eighth. He denies that the sewer and the paving and other work

done on 7th street and referred to in this paragraph of said bill was imperfectly and badly done in many particulars, and that it will last but a brief time, and the complainants be wrongfully and unjustly subjected to further costs and assessments on account of the imperfections and repair of said work, and he says that it was done in accordance with his contract with said board, as aforesaid, and that the work was of good material and well performed, and that the earth as filled was puddled and rammed, and that the foundation for the pavement was
121 of clay with a sufficient layer of gravel and the required thickness of sand on top, and was properly rolled and rammed and was regularly inspected by persons appointed by said board for such purposes.

Ninth. Having made no estimate of the cost of the entire work, he is unable to state positively what it would amount to, and he cannot admit or deny the averments of the ninth paragraph of said bill, except that he denies, as in the preceding paragraph, that the work has been imperfectly and improperly done, as averred in said ninth paragraph.

Tenth. He has no knowledge as to the allegations contained in the tenth paragraph of said bill, and can neither admit 'or deny the same.

122 Eleventh. He denies each and every of the allegations of the eleventh paragraph of said bill so far as they relate to him and the work done by him, whether as respects the character of the work, the material used, or authority or warrant for doing the same, and as respects all or any allegation of fraud.

Eleventh. Of the averments in this paragraph of the complainants' bill he has no knowledge to enable him either to admit or deny the same.

Twelfth. On his personal knowledge he denies that he combined and confederated in any manner with Albert Gleason or the District of Columbia or the board of public works, collectively or individually, to defraud the complainants, or any one of them, or the people of the
123 District of Columbia, and that the members of said board have authorized or permitted him personally or in connection with said Gleason to do so, or to do any part of the work on said street in an imperfect manner or in violation of any contract therefor, or to impose unlawful assessments on the complainants therefor, or to convert the proceeds of said work to his or their private use or emolument; and he further denies that he, as one of the defendants, has converted the materials referred to, to wit, curbing on said street, to his own use and profit, otherwise than to the extent to which he purchased the same; and on his information and belief, as well as to some extent on personal knowledge and observation, he denies that any or either of his
124 codefendants did so, and avers that all the statements and accusations of this paragraph are false, unjustifiable, and reckless, as well as manifestly wicked and malignant.

And he denies each and every of the allegations of said bill not hereinbefore specifically admitted or denied, and asks to be hence dismissed with his reasonable costs in this behalf sustained.

GEO. W. LINVILLE.

R. S. BOND,
Sol'r for Def't Linville.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have heard read the answer by me subscribed, and know the contents thereof, and that the facts therein

125 stated positively, or of his own knowledge, are true, and that the facts therein stated upon information and belief I believe to be true.

GEO. W. LINVILLE,

Subscribed and sworn to before me this 20th day of September, 1872.
[SEAL.] G. P. HOPKINS,
Notary Public.

EXHIBIT G. W. L., No. 1.—*Filed Sep.* 20, 1872.

OFFICE ENGINEER BOARD OF PUBLIC WORKS,
Washington, D. C., July 3, 1871.

GEORGE W. LINVILLE, Esq., *Contractor:*

SIR: You will build the sewer in Seventh street, southwest, in the following manner, viz: From the canal to G street put down
126 18-inch Scotch pipe on both sides of the street; from G street to L street build a brick sewer, three feet inside diameter, on both sides of the street; from L street to the point where the sewer discharges into the river build a brick sewer of six feet inside diameter.

A plan showing where to place the necessary drops and man-holes, also showing the house connections, will be furnished you. You will commence the pavement on the south side of M street on a line with the ferry-house, and run from thence to north side of B street, south west.

By order of the board of public works.

W'M FORSYTH,
First Ass't Eng. Board of Public Works.

127, 128 EXHIBIT G. W. L.—*Filed Sep.* 20, 1872.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, David R. Smith, a justice of the peace in and for the District aforesaid, personally comes Jno. G. Stephenson, who, first being sworn, deposes and says that on the eleventh day of July, 1871, he was appointed "superintendent of Seventh street improvements" by the board of public works of the District of Columbia, and directed to take charge of a sewer then being built from the south end of Seventh street to the Potomac River at or near M street; that he remained in charge of said work until the second day of August, 1871, when
129 he was relieved and Col. J. A. Stevenson was placed in charge of that work; that during the time between the dates above named he gave diligent attention both to the quality of the materials used and the manner of doing the work; that having been instructed to assume whatever authority was necessary to secure the best kind of work, he required the contractors to do all the work according to the specifications of their contract; and was, and is now, satisfied that the work done during the time above stated was done in a thorough and workmanlike manner; that he then believed, and now believes, that a sewer of the size there constructed, and below the level of the high tides, as that is for a considerable distance, is only barely sufficient to secure a safe passage for the drainage of Seventh street.

JNO. G. STEPHENSON.

130 Subscribed and sworn to.
[SEAL.]
DAVID R. SMITH, *J. P.*

EXHIBIT G. W. L., No. 2.—*Filed Sep.* 20, 1872.

WASHINGTON, D. C., *12th July*, 1871.

GENTLEMEN: I have received an order from M'r Forsyth, 1st ass't engineer, as follows: "You will build the sewer in 7th street, southwest, in the following manner: From the canal to G street, 18-inch Scotch pipe on both sides of the street; from G to L streets build a brick sewer 3 feet inside diameter on both sides of the street; from L street to the point where the sewer discharges into the river, build a brick sewer 6 feet inside diameter."

131 Also to "commence the pavement on the south side of M street on a line with the ferry house, and run from thence to the north side of B street, southwest."

I hereby agree to the modification of the contract made with M. G. Emery, mayor, bearing date the 30th March, 1871, with the understanding that I am to be paid for the additional work the prices named in said contract, where applicable; and for such work as is not provided for in said contract, I am to be paid for work and materials furnished at the established board prices.

Very respectfully, yours, etc.,

GEO. W. LINVILLE.

To Hon. BOARD PUBLIC WORKS,
District of Columbia.

132 EXHIBIT G. W. L., No. 3.—*Filed Sep.* 20, 1872.

BOARD OF PUBLIC WORKS,
DISTRICT OF COLUMBIA,
Washington, Aug. 4, 1871.

GEORGE W. LINVILLE,
Contractor 7th Street Improvement:

SIR: I am directed by the Board of Public Works to instruct you to see that all lateral sewers and openings are properly constructed and connected with the 7th st. sewer; also that gas and water connections are made, and to let M'r O'Hare make such connections.

Very respectfully,

J. M. BROWN, *Sec'ty*,
P'r GEO. W. BALLOCH.

133 EXHIBIT G. W. L., No. 4.—*Filed Sep.* 20, 1872.

WASHINGTON, D. C., *7th August*, 1871.

GENTLEMEN: Your order of August 4th, 1871, instructing me to have "all lateral sewers and openings properly constructed and connected with the 7th st. sewer; also that gas and water connections be made."

I have engaged M'r O'Hare to do this work at prices established by the board; shall expect to be paid accordingly.

Very respectfully, yours, &c.,

GEO. W. LINVILLE.

To Hon. BOARD OF PUBLIC WORKS,
District of Columbia.

134 EXHIBIT G. W. L., No. 5.—*Filed Sep.* 20, 1871.

WASHINGTON, D. C., *13th December*, 1871.

GENTLEMEN: I have received your order dated December 11th, ordering me to have "foot-crossings placed at 7th street, foot of L street,

also side-walk from intersection to the point at which wooden pavement intersects on Water street," with diagram accompanying. The engineer has ordered Scharf pavement instead of brick to be laid for side-walk, owing to the difficulty of paving next to the s'one sea-wall on Water street. I will execute the work, as per order of the engineer, at the prices established by the board for work and material furnished.

Very respectfully, yours, &c.,

GEO. W. LINVILLE.

To Hon. BOARD OF PUBLIC WORKS,
District of Columbia.

135 *Affidavit of Forsyth. Exhibit to Linville's ans.—Filed Sep.* 20, 1872.

In the supreme court of the District of Columbia, the 20th day of September, 1872.

MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity.

William Forsyth, being duly sworn, deposes and says that he is the surveyor of the District of Columbia, and that he exercised a general superintendence over the improvements made on 7th street west, from B street south to Water street, in the city of Washington, and made the plan for said improvements under the direction of the Board of Public Works.

Defendant further says that the plat marked "Exhibit No. 6," and referred to in the answer of George W. Linville, was prepared
136 under his direction, and that the same shows and illustrates the sewers, streets, squares, lots, &c., along the line of said improvements; that lots 79, 80, & 81, in square 465, are church property, and that there is no other church property along said line, and no school property on said line. Deponent further says that the pavements across the intersection of Virginia and Maryland avenues and C street, less one-sixth thereof, amounting to $9,716.67, and the sewerage across said intersections, less one-sixth thereof, amounting to $1,999.47, making the sum of $11,716.14, being opposite a Government space or reservation, was not charged against private property nor to the District of Columbia, with a view of the payment of the same by the United States according to the action of the Congress of the United States
137, 138 in other similar cases, the five-sixth being regarded as a reasonable proportion of the same to be paid by the General Government, and the appropriations made by Congress at its last session to pay for improvements opposite Government reservations and spaces were made upon the basis of five-sixths of the expense to be paid by the United States and one-sixth by private property.

And deponent further says that, as said plat shows, the only practicable way of obtaining an outlet for the 7th street sewerage was to extend the sewer along Water street to the Potomac River, and that, there being no assessable property on one side of said Water street, only one-sixth of the cost of the improvements along said street and oppo-
139 site square 472 was charged and assessed to the property along the line of 7th street, as is shown in Exhibit No. 4 of complainants' bill, being the itemized statement published by the Board of Public Works.

Deponent further says that in the itemized statements published by

the Board of Public Works, being Exhibit No. 4, referred to in complainants' bill, by a clerical error D street is mentioned instead of C street among the deductions made for intersections, and charged to the United States.

W'M FORSYTH.

Subscribed and sworn to before me this 20th day of September, 1872.
[SEAL.] G. P. HOPKINS,
Notary Public.

140 EXHIBIT NO. 2.—*Affidavit of Cassell.—Filed Sep.* 20, 1872.

Personally appeared before me, this 20th day of Sep., 1872, John T. Cassell, who, being duly sworn, deposes and says, that some time during the progress of paving 7th street there was a petition prepared and signed by property-holders on said street, among whom was this deponent, protesting against the manner in which the work was being performed. Said petition was presented the Board of Public Works, but no action was taken upon it or any attention paid to it.

J. T. CASSELL.

Sworn to and subscribed before me this twentieth day of September, 1872.
[SEAL.] E. L. SCHMIDT, *J. P.*

141 *Order overruling compl'ts' mo. for inj'n. Leave to am'd bill on terms.—Filed Sep.* 25, 1872.

In the supreme court of the District of Columbia, special term, equity, September, 1872.

MATTINGLY AND OTHERS
vs.
THE DISTRICT OF COLUMBIA, THE BOARD OF Public Works, Linville, and Gleason. } 2910. Eq.

This cause came on to be heard on a rule to show cause why an injunction shall not issue, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered as follows, namely:

1. That the motion for an injunction against the Board of Public Works and the District, as prayed, is overruled and disallowed, and the rule is hereby discharged.

2. That defendants Gleason and Linville are hereby enjoined
142 and restrained from receiving from the Board of Public Works or the District of Columbia, and the said District and board are enjoined and restrained from paying to said Linville and Gleason, any part or portion of the five per cent. admitted in the answer to be due, until the further order of this court.

3. Complainants are hereby granted leave to amend their bill of complaint as they may deem necessary within ten days from the date hereof, on the payment of the costs thereof, and shall serve the defendants with copies of the same, and said defendants shall be entitled to ten days thereafter to answer, plead, or demur to the same.

4. It is ordered that the Board of Public Works and the District
143 of Columbia pay into the treasury of the District of Columbia any and all sums of money which may be received from the assessments included in those mentioned in the bill, to be disbursed by the

said board, upon their warrant, as provided by law. Complainants to give bond as required by law.

D. C. HUMPHREYS,
Justice.

SEPTEMBER 25, 1872.

144 *Amended Bill.—Filed Oct.* 1, 1872.

In the supreme court of the District of Columbia, the first day of October, A. D. 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } 2910. Equity.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants complain as follows:

1. They are all residents of the city of Washington, in the District of Columbia, and are the owners and holders of certain real estate, lots of ground and premises, hereinafter to be mentioned and specified, in their own behalf and in behalf of all others similarly circumstanced who may come in and share the costs of these proceedings.

2. The defendant, the District of Columbia, is a body-politic and corporate under and by virtue of the act of Congress of the United
145 States approved February 21, 1871, entitled "An act to provide a government *of* the District of Columbia," and the defendants, Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, are residents of the said District of Columbia, and constitute and compose the Board of Public Works of said District created and provided for by the 37th section of the said act and appointed in pursuance thereof.

3. The complain'ts were on and before the 30th day of March, A. D. 1871, and yet are, severally seized and possessed in fee-simple, or were and are otherwise the owners and holders of certain lots, pieces or parcels of ground and premises, situated in and lying in the said city of Washington, and District of Columbia, and adjacent to and bounding upon the line of Seventh street west, in said city, between B street south and the Potomac River, as will more fully and specifically
146 appear from a sc'edule hereunto annexed and marked "Complainants' Exhibit No. 1," and made part of this bill of complaint.

4. The complainants, being so seized and possessed as aforesaid, have been assessed by the said the District of Columbia, and by the aforesaid Board of Public Works, (and have been required and directed to pay to the said Board of Public Works,) certain specified sums of money on account of certain alleged improvements, sewerage, and paving constructed, or alleged to have been constructed, on said Seventh street west, adjacent to and in front of the lots of ground and premises aforesaid of the complainants; and they have been notified by the said Board of Public Works and its officers and agents that said lots of ground have been assessed for such special improvements at the rate of eight dollars and seventy-four and forty-one one-hundredth cents ($8.74 41-100) per front foot of said lots, being in all the sums set opposite to the names of the complainants, respectively, in the schedule hereinbefore mentioned, marked "Complainants' Exhibit No. 1."

147 And the defendants have notified the complainants to pay the amounts so as aforesaid assessed against them, or the said Board

of Public Works, after the expiration of thirty days, will immediately issue certificates of indebtedness against the aforesaid property of the complainants, which assessment and certificate are declared to be a lien upon the said property and lots of ground, in pursuance of a certain act of the legislature of the District of Columbia approved August 10, 1871, of which said notice and act of the legislature a copy is herewith annexed, marked "Complainants' Exhibit No. 2," and made part of this bill. And the complainants are further notified in and by said notice that if the said assessments, with interest at the rate of ten per cent., should remain unpaid for one year the said Board of Public Works, upon the application of any holder of any of the said certificates, shall proceed to sell the said property or a proper part thereof.

148 5. The complainants charge that, in pursuance of certain ordinances of the mayor, board of aldermen, and board of common council of the city of Washington aforesaid, approved May 9, 1870, and June 10, 1870, and an ordinance amendatory of the former, approved March 28, 1871, of which said ordinances copies are hereunto annexed, marked "Complainants' Exhibit No. 3," and made part of this bill of complaint, the said mayor, board of aldermen, and board of common council, on the 30th day of March, A. D. 1871, entered into a contract with one George W. Linville, whereby, in consideration of certain prices therein specified to be paid to him, the said Linville agreed and contracted to construct a sewer in said Seventh street west, from Virginia avenue to the Potomac River, with man-holes, drops, traps, and lateral branches, and to pave the carriage-way thereof from B street south to Water street with the Follansbee wood pavement, and to do all the necessary grading, and furnish all the sand and gravel to make said pave-

149 ment complete, all in accordance with certain proposals and specifications signed by the said mayor of Washington and George W. Linville.

A copy of the said contract, proposals, and specifications is hereto annexed, contained in complainants' exhibit No. 4, made part of this bill of complaint.

6. Subsequently, the said George W. Linville, having entered upon the performance of the said work, the charter or act of incorporation of the said city of Washington was repealed by the aforesaid act of Congress, and the defendant, the District of Columbia, by virtue of the same act, succeeded to all the rights and privileges of the said the mayor, board of aldermen, and board of common council of the city of Washington. Whereupon the said Board of Public Works assumed the control and direction of the aforesaid sewer and paving and other work to be done under the aforesaid contract.

7. Subsequently, by an order bearing date on the 3d day of

150 July, A. D. 1871, the said Board of Public Works, illegally and without any warrant whatever of law, and in violation and derogation of the aforesaid contract, directed the said George W. Linville to construct the said sewer in a different manner and of different dimensions from those provided for in said contract; and the said George W. Linville, in compliance with said order, constructed said sewer in a manner and of dimensions different from the provisions of the aforesaid contract and specifications, and without any valid contract entered into with the said Board of Public Works, as required by law, whereby the cost of the said sewer was greatly enhanced, and the liabilities of these complainants unjustly and unwarrantably increased. A copy of the said order is found in complainants' Exhibit No. 4, hereinbefore referred to.

8. These complainants charge that the work of the aforesaid sewer, paving, and other work, provided for in the aforesaid contract,
151 was imperfectly and badly done in many particulars, and did not and does not now correspond to the requirements of the aforesaid contract, proposals, and specifications; that in the construction of said sewer the earth, as filled, was not puddled, and there was no systematic or proper inspection of the work as it progressed; that the foundation of the pavement is not of clay, free of loam, and rammed and rolled, as required by the contract and specifications, and that not more than three inches of gravel, on an average, has been laid under said pavement, whereas said contract required eight inches of gravel and four inches of sand, and said gravel has not been rolled and rammed; that said work, being so imperfectly constructed, will last but a brief time, and the complainants will thus be wrongfully and unjustly put to further costs and assessments for the repair thereof.

9. These complainants aver and charge that if the said work
152 had been fairly and properly done, in accordance with the provisions of the aforesaid proposals, contract, and specifications, and a fair and just assessment had thereon upon the property aforesaid of the complainants, the proper share of the complainants would have been no more than about two dollars and sixty-four cents ($2.64) per front foot, assessable upon and chargeable to the complainants on account of the property aforesaid, and that no more than the said sum is justly due from the complainants in the premises upon a fair and proper accounting. But these complainants further say that, inasmuch as the said work has been defectively and improperly done, and is not in accordance with the requirements of the proposals, contract, and specification aforesaid, they are not justly and lawfully chargeable with any sum whatever.

153 9*a*. The complainants further aver and allege that in making the aforesaid assessment the defendant, the Board of Public Works, proceeded apparently within the scope of its powers, and that its proceedings were upon their face valid, and that said assessments and the certificate of indebtedness (when the same shall be issued) will create and be a valid lien upon the said real estate of these complainants; and they further allege that, notwithstanding such apparent validity, said proceedings were wholly void by reason of divers matters which do not appear upon the face of said proceedings or upon the records of said assessments, and can only be established by evidence extrinsic thereto; that the said defendant derived authority to make the improvements, sewerage, and paving, as aforesaid, solely from and under the said ordinances of the mayor, board of alderman, and board
154 of common council of the city of Washington of May 9, 1870, and June 10, 1870, and the said amendatory ordinance of March 28, 1871, copies whereof are filed as aforesaid, marked "Exhibit No. 3;" that notwithstanding the said ordinance of May 9, 1870, authorized and directed the construction of said sewer in said Seventh street west, commencing at the river and running thence north, and continuing to the south side of Virginia avenue, and notwithstanding the said amendatory ordinance of March 28, 1871, prescribed the dimensions of said sewer to be as follows, to wit, "not more than two feet inside diameter from the river to the south side of E street south, and eighteen inches inside diameter from the last-named point to the south side of Virginia avenue," the said defendant, in derogation of its said authority, undertook to enlarge and actually did enlarge the distance between the termini of said
155 sewer, and greatly altered and increased the dimensions thereof

by causing it to be constructed "from the canal to G street south of 18-inch Scotch pipe; from G street to L street of brick, three feet inside diameter; and from L street in Water street to the river, a distance of about six hundred and forty feet, of brick, six feet inside diameter;" that said sewer of six feet inside diameter is entirely beyond the line of Seventh street west, and is constructed and runs wholly in said Water street until it debouches at the river; and said complainants aver that no necessity existed for so as aforesaid increasing the length and size of said sewer in said Seventh street, or of extending the same in and along said Water street to its present terminus at the river; on the contrary, they say that if the said sewer had been constructed in the manner authorized and prescribed by said ordinances, its capacity
156 would have been adequate to all purposes of a sewer, and equally desirable and more direct and shorter outlet would have been provided, and the expenditure of a large sum of money, to wit, the sum of $———, occasioned by the aforesaid unnecessary and illegal alterations by the defendant, have been avoided; and these complainants further allege and charge that said proceedings and assessment of the said defendant, although, as aforesaid, prima facie valid, are nevertheless actually void by reason of the following, among other matters, which they say can be established only by evidence extrinsic to the records of the said proceedings and assessment, to wit:

An expenditure and charge by the said defendant of the sum of $577 for the alleged superintendence of said work, contrary to the said ordinance of May 9, 1870, which provided that the same should be superintended by the municipal officer.

157 The sum of $, illegally expended in the construction of said sewer of six feet inside diameter in Water street, extending about six hundred and forty feet beyond the line of said Seventh street west, and not bounded by or adjacent to the property on said street; the sum of $, being the difference in the cost of constructing said sewer as provided by the said amendatory ordinance of March 28, 1871, and the cost of constructing the same as unnecessarily altered in dimensions and length by the said defendant, the Board of Public Works.

The unauthorized laying of 183 square yards of Scharf pavement on said Water street, wholly beyond the line of said Seventh street west, for which these complainants are illegally assessed a proportion of the sum of $256.20, alleged to be the cost thereof.

158 The alleged cost of 6,243 square yards of new cobble-stone, for which these complainants are wrongfully assessed a proportion of $133.10.

The alleged cost of 2,178.8 square feet of flagging, for which the complainants are in like manner assessed in proportion of the sum of $217.68.

26½ feet of 3-inch curb and setting, alleged to have cost $66.12.

Alleged cost of work, paving, grading, curbing, and hauling, by the defendant, Albert Gleason, wholly unauthorized by said ordinances or any contract made in conformity therewith, and for which these complainants and other property-holders on Seventh street west are wrongfully assessed the one-third part of the sum of $7,356.03.

The assessment upon private property of the cost of constructing the man-holes, drops, traps, and lateral branches of said sewer, ex-
159 pressly exempted from such assessment by the ordinance of May 9, 1870, amounting to the sum of $16,521.04.

The assessment upon the property of these complainants, among other private property-owners, of the cost of improvements in front of church property, wholly exempted from taxation by the act of Congress en-

titled "An act exempting from taxes certain property in the District of Columbia," &c., approved June 17, 1870, whereby the rate of said assessment was unlawfully increased from $8.62 98-100 per front foot to the sum of $8.74 41-100 per front foot.

The wholly unauthorized charge of five per cent. upon $157,583.34, the gross amount of said expenditures, being the sum of $7,879.16, included in said assessments as for alleged "contingent expenses:"

Wherefore these complainants say they are wholly remediless
160 at law, and can find relief only in a court of equity; and these complainants joining together, unite in this proceeding to save multiplicity of suits.

9*b*. These complainants, to the end that it may fully appear to what amount they were justly liable to be assessed for said sewerings and paving under and by virtue of the said contract of the mayor, board of alderman, and board of common council with the said George W. Linville, and under and by virtue of said ordinances, pray leave to refer to a statement of expenditure on a basis of prices in said contract prescribed, filed herewith, marked "Complainants' Exhibit No. 5," and made part hereof.

9*c*. These complainants further aver and allege that said certificates of indebtedness are, as aforesaid, designed to operate as a lien and encumbrance upon the said premises of these complainants, and it
161 issued, must seriously interfere with and prevent the transfer or alienation thereof by these complainants, and will subject their said premises, at any time after the expiration of one year from their date, to be sold by said defendant, the Board of Public Works, at the request of the holder or holders of said certificates.

10. These complainants further allege and aver that, upon the receipt by them of the notices aforesaid, they respectfully requested to be furnished with a bill of items of the aforesaid assessment levied upon them, and called upon the officers of the said Board of Public Works for that purpose, but the said Board of Public Works has wholly neglected and refused to furnish such a bill of items, and the complainants have never been furnished with such bill, as was their right;
162 but the complainants have reason to suppose that a certain printed statement, published in one of the newspapers of the city of Washington subsequent to such request of these complainants, was and is intended by said Board of Public Works to be an authorized account and detailed statement of the aforesaid assessment and of the grounds thereof, which said printed statement is annexed hereunto, marked "Complainants' Exhibit No. 4," and made part of this bill of complaint.

11. These complainants further aver and allege that the assessment so as aforesaid made on the property of these complainants is fraudulent, excessive, and illegal in divers particulars, and especially in these among others: That the sum of $577 is therein charged for superintendence without warrant of law; that each lot is charged with a proportionate share of the cost and expense of the entire street,
163 whereas it should be charged only with its own special improvement, to wit, with its proportionate share of the cost of the improvement of the street immediately joining thereto; that the assessment includes the cost and expense of the aforesaid work in front of the churches and school-houses on said Seventh street, a proportionate share whereof, amounting to 11 43-100 cents per front foot, is charged upon the complainants and their property aforesaid, contrary to law; that the sum of five per centum of the alleged total cost, said five per cent. amounting to $7,879.16, is arbit'arily added in said assessment

to the said total cost without any cause or ground whatever alleged, and wholly without warrant or authority of law; that said assessment includes curbing of the street with new curb and paving the sidewalks, (including Scharf pavement,) for which the complainants believe no contract whatever existed, and which was wholly unnecessary
164 and uncalled for by the condition of the said curbing and sidewalks; and lots of the complainants remote from the said curbing, and in no way benefited thereby, have been specially assessed therefor in said assessment; that said assessment includes certain work alleged to have been done by one Albert Gleason, which work these complainants believe and charge to have been done without warrant of law; that the said assessment further includes the cost and expense of a six-foot sewer along Water street, between Sixth street west and said Seventh street, not provided for in the contract aforesaid with George W. Linville, nor, as far as the complainants are advised, in any contract whatsoever, nor properly chargeable in any event to *to* these complainants on account of their property aforesaid abutting on said Seventh street; that old material, curbing, cobblestone, and brick
165 previously used in and upon the said Seventh street in the paving of the carriageway and sidewalks thereof, and of great value, to wit, of the value of $ and upward, were removed and taken away by the defendants and their agents in the progress of the aforesaid work and converted by the said defendants and their agents and employees to their own private use and profit, and no account taken of the said material in the said assessment and no allowance made therefor to the complainants; that various charges for portions of the said work, as stated in the aforesaid Exhibit No. 4, are excessive and extravagant, as will appear upon a just accounting; and that the said work has been very considerably overmeasured, as these complainants expect to show and prove.

11. These complainants further aver and charge that, for the causes and reasons hereinbefore alleged and set forth, and for divers other manifold inaccuracies and irregularities, the aforesaid assessment
166 levied by the defendants upon these complainants on account of their property aforesaid is wholly illegal and unjust, and without warrant of law; and that the said assessment has been fraudulent and wrongfully levied with purpose and intent to defraud and injure these complainants, and to deprive them of their just rights in the premises.

12. These complainants further charge and aver that the members of the said Board of Public Works, combining and confederating individually with the said George W. Linville and Albert Gleason to defraud these complainants and the people of the District of Columbia, have permitted and authorized said Linville and the said Gleason to do the aforesaid work in an imperfect manner as aforesaid, and in violation of the contract aforesaid, and to impose the said unlawful assessments upon these complainants, and to convert the proceeds
167 thereof to their own private use and emolument; and that the said defendants have converted the materials aforesaid—curbing, bricks, and other materials taken from the aforesaid Seventh street—to their own use and profit.

13. These complainants aver and charge that the said defendants, the District of Columbia and the Board of Public Works, have long since used and expended the money heretofore appropriated by the said legislative assembly for the cost of special improvements in said District, and that the defendants, at the present time, are insolvent and are and would be wholly unable to refund to these complainants any

sum or sums of moneys which, on account of said assessments, they might pay to said defendants over and above what may be found to be due from them for the reasonable cost of said improvements on the final hearing of this cause.

168 14. These complainants further say that they are informed and believe that the entire amount appropriated by Congress to pay the reasonable expenses theretofore incurred for paving roadways, and arching and paving sidewalks in front of the property of the United States in the District of Columbia, to wit, the sum of one hundred and ninety- thousand hundred and dollars, has been used and disbursed for paving, curbing, etc., in front of other property of the United States than such as is located on Seventh street, or that part thereof lying between Maryland avenue and the Potomac River, and that none of said sum so appropriated is now available to pay for the work on the part of said Seventh street west, between Pennsylvania avenue and the river, referred to and brought in question in this case; and these complainants require said defendants to

169 set forth and disclose particularly how much of said sum has been drawn and expended, specifically; for what purpose used and appropriated; on what particular work, and in front of and adjacent to what particular work, is the public property located, on account of which sum or sums may have been paid; and said complainants further require said defendants to disclose and set forth when such payment and appropriation of such sums so appropriated by the National Government were made.

15. These complainants further say that they are informed and believe that said defendants, the Board of Public Works, or the individuals composing the same, design and intend to collect the special assessment set forth and made as alleged in complainants' bill, and have required the same to be paid at the office of said defendants, and design to take the proceeds thereof into their own custody and trol;

170 and these complainants further say that they are infor and believe that said defendant, the Board of Public Works, has appointed one of the members thereof as treasurer, to hold, and keep, and disburse the funds that may be so collected, and that they are thereby evading the law and collecting funds contrary to the provisions of the statutes of the United States and the acts of the legislative assembly of this District; and these complainants require said defendants to answer and discover whether the said board, or the individuals composing the said Board of Public Works, or some of them, have not directed the amount of said special assessment to be paid to them or some of them as the officer of said board; and whether they have not appointed a treasurer as aforesaid, from among their number; and to set forth, and specifically, the duties they have assumed to im-

171 pose on such treasurer, and whether it is not their purpose and intent to collect directly, without the intervention on that behalf of any other officer of the District government, the said special assessment; and also to state, particularly, what officer there is at the office of the said defendant, the Board of Public Works, authorized to receive payment of said special assessment.

16. These complainants further say that they are informed and believe that the sewer for which, in part, the said special assessment is purported to be made in this case, runs in and along Water street and across M street and L street south, a distance of, from said Seventh street, at least six hundred and forty feet; and that the construction of this part of said sewer, so running in and along said Water street, is more expensive, in proportion, than any other portion of said

172 sewer in and along said Seventh street west: and they require said defendants to discover, particularly, what distance said sewer runs from the termination of said Seventh street southwest to the mouth of said sewer, and what was the cost of constructing and building that part thereof; and what is the distance from the line where said Seventh-street sewer intersects the north line of said Water street to the river; also, what other sewer discharges into said Seventh-street sewer and connects therewith, where said connecting sewer runs, and the length thereof.

17. These complainants further require said defendants to disclose and discover, particularly and in items, for what the amount charged as for "general expenses," to wit, the sum of seven thousand eight hundred and seventy-nine dollars and sixteen cents, was in fact assessed, for what the same was paid, if paid, and for what the same is now due, if unpaid; and also to state whether the same is now due if
173 unpaid; and also to state whether the statement published and signed "Alex. Shepherd, vice-president," and made an exhibit to the bill, marked "No. 4," is true and correct, and embraces all the items of account making up the aggregate of said work, and, if not, what has been omitted therefrom.

The complainants therefore pray as follows:

1. That the District of Columbia aforesaid, and the said Henry D. Cook, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, and also the said George W. Linville and Albert Gleason, be made parties hereto as defendants, and be served with process.

2. That the said defendants, and each and all of them, to wit, the said The District of Columbia and the said Board of Public Works,
174 and their successors in office, be enjoined and restrained by the order of this honorable court from issuing certificates of indebtedness against the property aforesaid of these complainants on account of the aforesaid assessment.

3. That a temporary injunction or restraining order to the same effect issue against the said The District of Columbia and the said Board of Public Works, their agents, officers, and employees, until the further order of the court in the premises.

4. That the aforesaid assessments on the property of these complainants be declared and decreed to be illegal, null, and void, and of no validity whatever to charge the said property with any lien.

5. That the said George W. Linville and Albert Gleason be enjoined from receiving, and the said District of Columbia and the said Board of Public Works from making, any payment whatever on ac-
175 count of said work.

6. That it be referred to the auditor of this court to state a proper account of the aforesaid work; to inquire into the manner in which the same has been done, and to take testimony in reference to the items of the aforesaid assessment.

7. That the complainants may have such other and further relief as the nature of their case may require and may seem just and proper in the premises.

GEORGE MATTINGLY.
JOHN VAN RISWICK.
W'M N. CROGGON.
G. E. KIRK.

R. T. MERRICK, *of Counsil.*
T. A. LAMBERT, *Solic'tor.*

176 We do solemnly swear that we have heard read the amended bill by us subscribed, and know the contents thereof; and the facts therein stated upon our personal knowledge are true, and the facts therein stated upon information and belief we believe to be true.

JOHN VAN RISWICK.
W'M N. CROGGON.

Sworn and subscribed before me this 1st of October, 1872.

E. L. SCHMIDT, *J. P.* [SEAL.]

Summons to answer amended bill.—Issued Oct. 1st, 1872.

In the supreme court of the District of Columbia, October 1st, 1872.

GEORGE MATTINGLY ET AL., COMPLAINANTS,
against
THE DISTRICT OF COLUMBIA ET AL., DEFENDANTS.
No. 2910. Equity docket 12.

The President of the United States to Henry D. Cooke, governor, and president of the Board of Public Works, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting said Board of Public Works, defendants.

177 You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. CARTTER, *Chief-Justice.*

R. J. MEIGS, *Clerk,*
By J. JAY CAMP, *Ass't Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable, otherwise the bill may be taken for confessed.

Restraining order.

An original bill praying the issuance of an injunction against defendants as prayed is this day filed. Hearing is fixed for the 11th
178 instant (October, 1872) at 11 o'clock a. m. Until further order, you are hereby restrained as prayed.

A. WYLIE, *Justice.*

Marshal's return.

Summoned H. D. Cooke, governor, and left with him amended bill and notice for injunction.

Also A. R. Shepherd a notice for injunction, October 4th, 1872.

Summoned A. Gleason and G. W. Linville Oct. 5th, 1872.

A. SHARP, *Marshal.*

Exhibit to amended bill.—Filed Oct. 2, 1872.

Calculations for the cost of grading and paving the carriage-way of South Seventh street, in accordance with the contract of G. W. Linville, dated March 30, 1871.

From B street south to Water street, the limits of the contract there are the following squares, with the dimensions annexed:

179

Squares fronting on 7th st.			*Squares fronting on 7th st.*		
No. 433	350 f't.		No. 462	320 f't	2 inch.
434	241 "		464	183 "	5 "
435	456 "	10 inch.	No. 465	436 "	10 "
436	254 "		466	274 "	4 "
437	274	4 inch.	467	274 "	4 "
438	274	8 "	468	274 "	8 "
439	274	8 "	469	274 "	8 "
S. 439	235		470	235 "	
W. 471	235		471	235 "	
	2,568 f't	6 inches.		2,508 "	5 inches.

Width of carriage-way, 18 f't 6 inches on each side of R. R.

West side 2,568 f't 6 inch. x 18 f't 6 in. = 47,517 sq. f't = 5,279¾ sq. y'ds.
East side 2,508 " 5 inch. x 18 f't 6 in. = 46,405 sq. f't = 5,156 sq. y'ds.

10,435¾ sq. y'ds.

10,435¾ sq. y'ds, @ $3.80 per sq. y'ds = $39,655.85; of which ⅙ assessable to individuals = $6,609.31; which, divided by 5,077 f't, gives $1.30 per front foot for grading and paving.

For sewer, $368 per lineal foot, and there being two sewers there will be one-third of each, or $1.23 per front foot, assessable to individuals on each side.

Therefore—

For grading and paving	$1 30	per front foot.
" sewer	1 23	" " "
Total assessment	$2 53	" " "

180 *Injunction bond.—Filed Oct.* 9, 1872.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL.

Whereas on the twenty-fifth day of September, A. D. 1872, the court ordered a preliminary injunction in the above-entitled cause, whereby the defendants, George W. Linville and Albert Gleason, are enjoined and restrained from receiving from the Board of Public Works or the District of Columbia, and the said District of Columbia and Board of Public Works are enjoined and restrained from paying to said George W. Linville and Albert Gleason, any part or portion of the five per centum admitted in the answer to be due: Now, therefore, we, the complainants above named, do hereby undertake to make good to the defend-
181 ants all damages which may be by them suffered or sustained by reason of wrongfully and inequitably suing out said injunction.

And we hereby stipulate that the damages may be ascertained in such manner as the justice shall direct, and that in dissolving the injunction he may give judgment thereon against the said complainants for said damages in the decree itself dissolving the injunction.

Witness our hands this ninth day of October, A. D. 1872.

GEO. MATTINGLY.
J. VAN RISWICK.
W. GUNTON.

Approved:

A. WYLIE.

182 *Answer of B. P. Works to amended bill.—Filed Oct. 26, 1872.*

Supreme court of the District of Columbia, the 26th day of October, 1872

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } Equity. No. 2910.

The separate and joint answer of Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Adolf Cluss, and S. P. Brown, members of the Board of Public Works.

The said defendants, constituting and composing the Board of Public Works, now and at all times hereafter reserving all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much of the amended bill of the complainants as is not demurred to, and as they are
183 advised is material for them to answer, say:

They deny that the' derived authority to make the improvements on or along Seventh street, referred to in the amended bill, sewerage and paving, solely from and under the ordinances of the mayor, board of aldermen, and board of common council, set out as Exhibit No. 3 of complainants' original bill; and they say that whatever powers they possess as respects making improvements is derived primarily from the act of Congress entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, and also from acts of the legislative assembly, especially the acts of July 10, 1871, August 10, 1871, and August 11, 1871, and by reason of their appointment
184 under said act of Congress as members of the Board of Public Works and their qualification as such members, on the 16th of March, 1871; and they say that they assumed and took control of said improvements under and by virtue of their appointment and authority, as aforesaid; and that the contract with the mayor, board of aldermen, and board of common council therefor was made on the 30th day of March, 1871, and after they entered upon the performance of the duties of their said office; and they further say that the changes and modifications made in said work or improvements, and of which the complainants complain, were made by them in the exercise of their power as said board after their appointment and qualification aforesaid, and
185 they deny that said charges were in derogation of any authority binding on them; and they deny that they greatly altered and increased the distance between the termini of said sewer, which constitutes a part of said improvements, and that they greatly enlarged the dimensions thereof; and they deny that said sewer, as provided for in said contract with the city of Washington of March 30th, 1871, would have been adequate to all purposes of a sewer and equally desirable as that constructed by them, or a more direct or shorter outlet to the river; and they say that they only made such alterations and enlargement of the same as was, after consultation, found necessary and proper, and that said alterations and enlargement were necessary and essen-
186 tial to the proper drainage of said Seventh street, and are of great benefit to the property along the line thereof. And they deny that said sewer of six feet diameter is entirely beyond the line of said Seventh street west, and is constructed and runs wholly in Water street; and they say that it is connected with the sewer on the line of Seventh street, and passes from that to the river, and that it affords a direct

and proper outlet for said sewer from said Seventh street to the river, all of which will more fully appear by reference to the answers to the original bill, and the affidavits of William Forsyth and others, made exhibits to said answer, as well as to the affidavit of James A. Stevenson, hereto attached, marked "Exhibit A," and made part hereof.

187 And they deny that in making the assessments mentioned in said bill they proceeded only apparently within the scope of their powers, and that said assessments are only valid on their face; and they say that in making the same they acted within the letter and intention of the said act of Congress of the 21st of February, 1871, and of the act of the legislative assembly of the 10th of August, 1871, entitled "An act prescribing the mode of assessment for special improvements and providing for the collection thereof;" and the said assessments are based on a statement of the costs of said improvements prepared by them and on file in their office, to which they hereby refer, and a copy of which is hereto annexed as Exhibit B and made part hereof.

188 The third section of the act of the legislative assembly of the 10th of August, 1871, declares that "until paid the assessment and certificate" for improvements made and issued by the Board of Public Works "shall remain and be a lien upon the property on or against which they shall have been issued;" and they say that said assessments and certificates, when issued, will be a lien within the meaning and purpose of this provision of the law.

They deny that the proceedings of assessments aforesaid are wholly void *of* reason of divers matters which do not appear on the face of the said proceedings, or upon the record of said assessment, which matters can only be established by evidence extrinsic thereto; and they

189 say, of their personal knowledge, that all the facts connected with said proceedings or assessments are, as they should be, of record or of files in their office, and appear, as respects both items and aggregates, in different written and printed matter therein; and that said statement, marked "Exhibit ," of itself shows the particulars and totals of the cost of said improvements, one-third of which is assessed against the named and other complainants, and that no extrinsic evidence can add to or alter the facts and figures of said statement and the other papers and records referred to, all of which *is* a proper proceeding can be produced before the court.

And they deny that said proceedings and assessments are

190 actually void by reason of any or all the matters particularly mentioned in said bill, or by reason of any other matters referred to therein, and that the alleged invalidity can be established only by evidence extrinsic to the record of said proceedings and assessments; and they deny that any of the enumerated matters, for which it is alleged that extrinsic evidence is necessary, are of a character requiring such evidence as will appear by reference to said matters as set forth in the bill, as well as otherwise.

9 *b*. And they deny that Exhibit No. 5 of the amended bill sets forth the amount to which the complainants would have been justly liable for said sewering and paving by virtue of the said contract with

191 the mayor, board of aldermen, and board of common council, and under the ordinance thereof; and they say that the cost of said work, if the same had been done according to said contract and ordinances, would have been largely in excess of the amount shown by said exhibit.

9 *c*. And they deny that said certificates of indebtedness are designed

to operate as a lien and incumbrance upon the property of complainants; and they say that by the act of the legislative assembly the said certificates, together with the assessment, will be a lien until paid. And they deny that the issuing of said certificates must seriously interfere with and prevent the transfer or alienation of said property, and that the same will subject the said property after the expiration of one year
192 to be sold by the Board of Public Works at the request of the holder of such certificates; and they say that it is only in the event of a refusal to pay the assessments within one year that the same, or so much thereof as may be necessary to pay each separate assessment, will become liable to be sold.

And they deny that the complainants are wholly remediless at law and can find relief only in equity; and they say that if any wrong has been done therein in the said assessments, either as respects the mode in which the same have been made or the amount thereof, the complainants have different and ample remedies at law.

13. And they deny that the defendants, the District of Columbia
193 and the Board of Public Works, are insolvent and would be wholly unable to refund to the complainants any sum or sums of money which, on account of said assessments, they might pay to the defendants over and above what may be found to be due to them for the reasonable cost of said improvements on the final hearing of the cause.

14. This paragraph is demurred to.

15. This paragraph rests only on information and belief. They admit that it is their intention to collect the said assessments, as required to do by the act of the legislative assembly of the 10th of August, 1871, and to have them paid at their office, and they say that it was competent for said legislative assembly to constitute said board as the collector of the same, and that in the act of August 23, 1871, prescribing,
194 among other things, the duties of the collector of taxes, he is confined to the collection of taxes imposed by the government of the District of Columbia, and of these only so far as are not otherwise provided for, thus showing that it was the intention of the legislature not only to limit his duties, but also to provide, as it has done, for collection of different funds by different officers.

They deny that it is their design to take the proceeds of the assessments into their own custody and control, and they say that such proceeds as collected will be deposited or placed in the hands of the treasurer of the District, and that if any necessity existed for the interference of the court in reference to this matter it has been fully done by the
195 decree of Hon. D. C. Humphreys of September 25, 1872, so that a reference to it in an amended bill filed on the 1st of October is improper and impertinent.

And they deny that they have appointed one of their number treasurer to hold, keep, and disburse the funds that may be collected by them for improvements, and that they are thereby evading any law and collecting funds contrary to the provisions of the statutes of the United States and the acts of the legislative assembly of this District.

George W. Beall, the person authorized by the defendants to receive payment of said special assessments, as will more fully appear by reference to the notices of assessment given to the complainants.

196 16. They admit the general correctness of this paragraph as to the course and extent of the part of the sewer referred to in it. And although the complainants are not entitled, by reason of anything or matter stated in this paragraph, to the discovery which it seeks, they say that the distance of the sewer from the river to L street, or which is

called by some the end of Seventh street, is 650 feet 8 inches, and that the cost thereof was $7,823.00, all of which will more fully of W'm Forsyth, and made part hereof as Exhibit C.

17. They say that neither the manner in which the demand for discovery is made in relation to the items of general expenses, viz, $7,879.16, nor the character of the matter itself, entitles the complainants to the information sought.

197 And they that this constituted part of the original bill, and was answered, as will appear by reference to paragraph of said answer. And they further say that this, besides expenses for engineering the same, includes necessary clerical hire and incidental labor essential and necessary to the proper execution of said work, and the preparation and keeping of the accounts and papers connected therewith; and that, from the nature of the duties devolved upon the defendants by the act of Congress aforesaid, it is impossible that the said improvement and the work could be properly carried on without these expenses, and that they constitute a fair and just proportion of the expenses necessary to the execution of said work, and an in-

198 separable incident of the cost thereof. And they say that no unauthorized or useless cost or expense was included in said item of five per cent., but only such as was found essential to the proper execution of the improvements aforesaid, and such as is customary in similar work, whether executed by the General Government or by companies interested therein; and that it is only one-third thereof, or one and two-third' per cent., which is assessed against the private property of the complainants, and not the whole thereof. And they say, among the engineers employed and paid was Gen. George S. Greene and W'm Forsyth, and among the clerks, Edward Johnson, Charles S. Johnson, J. C. Lay, and others, which will more fully appear in part by ref-

199 erence to the records of their office.

18. They say that the matter of the amended bill consists almost entirely of the averments and matter of the original bill, expressed in a modified and enlarged form; and while they have answered the same they say that they have done so for the purpose of having the case decided with as little delay as possible; but they respectfully submit that the repetition of the same matter renders the case tedious and prolix, and that the court take such action in relation thereto as may seem to it proper.

19. They deny any and all allegations of this bill not hereinbefore admitted, denied, or demurred to.

20. Having answered fully the amended bill, they pray that

200 they may be hence dismissed with costs, and that the rule may be discharged and the restraining order dissolved. And they will pray, &c.

H. D. COOKE,
ALEX. R. SHEPHERD,
ADOLF CLUSS,
JAMES A. MAGRUDER,
Constituting and comprising Board of Public Works, D. C.

WILLIAM A. COOK,
Sol. for Def'ts.

DISTRICT OF COLUMBIA, *ss:*

We, Henry D. Cooke, Alex. R. Shepherd, Adolf Cluss, and James A. Magruder, members of the Board of Public Works of the District of Columbia, do solemnly swear that we have heard read this answer by us

subscribed, and know the contents thereof, and that the facts therein
201 stated positively or upon our personal knowledge are true, and that the facts therein stated upon our information and belief we believe to be true.

H. D. COOKE.
ALEX. R. SHEPHERD.
ADOLF CLUSS.
JAMES A. MAGRUDER.

Sworn and subscribed before me this 26th day of Oct., 1872.

JOHN F. COOK, *J. P.*

Exhibit B to answer to amended bill.—Filed Oct. 26, 1872.

EXPENDITURES ON ACCOUNT OF SEWERS.

Location.	Contractors.	Dimensions.	Materials.	Number of lineal feet.	Connections. Dimensions.	Connections. Number of lineal feet.	Laterals; number of lineal feet.	Man-holes, No.	Traps and receiving basins.	Prices.		Total cost.	Paid for auditor's certi. No. pts.	Paid for auditor's certi. Amount.	Total payment and cost.
Seventh street west, from B south to river.	George W. Linville.	.....	198,600 brick	.....	.....	.....	.....	...	.....	.....	$4,369 20	.....	967		
			24,500 feet lumber	.....	.....	.....	.....	...	.....	.....	784 00	.....	340		
			25 bbls. cement	.....	.....	.....	.....	...	.....	.....	50 00	.....	252		
			Carpenters' labor, &c	.....	.....	.....	.....	...	.....	.....	110 00	.....	274		
			Labor: filling, digging, stone-mason's work, &c.	.....	.....	.....	.....	...	.....	.....	125 50	.....	385 485 748		
			Timber, labor carts, removing surplus earth, &c.	.....	.....	.....	.....	...	.....	.....	2,350 00	.....	801 930 968		
								3	.....	$100 00	300 00	.....	4		
									3	129 00	447 00	.....	233 326		
												$8,535 70			
		3 f't 3 in.	Brick	2,940½	.....	.....	.....	...	.....	5 50	16,173 68	.....	533	$64,760 36	
		18 in.	Scotch tile	5,908	.....	.....	.....	...	.....	3 68	21,741 44				
												$37,915 12			
									35	117 00	.....	5,145 00			
								73	.....	100 00	.....	7,300 00			
							1,067	...	.....	3 12	.....	3,329 04			
					8 in	759	.....	...	.....	2 00	1,518 00				
					6 in	534	.....	...	.....	1 25	667 50				
					35 brick	.....	.....	...	.....	10 00	350 00				
												2,535 50			
				8,848½		1,293	1,067	76	38			$64,760 36		$64,760 36	64,760 36

Exhibit B to answer to amended bill.—Filed Oct. 26, 1872.

EXPENDITURES ON ACCOUNT OF STREETS.

Location.	Contractors.	Materials. Brick laid. New, sq. y.	Brick laid. Old, sq. y.	C. stone, new, sq. y.	Crossings: flaggings relaid: relaid, feet.	Curb and setting, new, feet.	Curb and resetting, old, feet.	Grading, yards.	Pavement laid, yards.	Superintendents' pay.	Sewer and water services.	Miscellaneous.	Quantities, feet.	Prices.		Total cost.	Paid for aud'r's certificate. No., part of—	Paid for aud'r's certificate. Amount.	Amount reserved from contractors.	Total payments and costs.
Seventh street southwest, from B street south to the Potomac River.	George W. Linville	....	....	....	....	....	.....	.....	.....	.....	$1,866 75									
	Extra labor	....	....	....	....	....	.....	.....	.....	.....	.....	$24 25	.....	.....		$1,891				
	Wood	....	....	....	....	....	.....	.....	22,140	.....	.....	.....	.....	$3 10	$68,634 00	.....	967			
								22,140	.....	.....	.....	.....	.....	70	15,498 00	.....	340			
	Scharf	..	....	....	242	..	.....	.....	183	.....	.....	.....	.....	1 40	256 20	.....	252			
					2,176	..	.....	.....	.....	.....	.....	.....	.....	55	133 10	.....	274			
								.....	.....	.....	.....	.....	.....	10	217 68	.....	385			
							264½	.....	.....	.....	.....	.....	264½	25	66 12	.....	485			
								302	.....	.....	.....	.....	.....	20	60 60	.....	748			
																84,865 70				
	J. A. Stevenson	....	....	..	....	..	.....	.....	.....	577 00	.....	.....	.....	.....	.....	.....	801			
																577 00	930			
	T. Lubey	....	....	..	....	..	.....	.....	.....	.....	414 00	.....	.....	.....	.....	414 00	968			
	A. Gleason	3,065	....	..	....	..	.....	.....	.....	.....	.....	.....	.....	80	.....	2,452 00	4			
			4,069	..	....	..	.....	.....	.....	.....	.....	.....	.....	25	.....	1,017 25	233			
				155	....	..	.....	.....	.....	.....	.....	.....	.....	55	.....	85 25	326			
					5 in.	..	.....	.....	.....	.....	.....	.....	2,305	92	.....	2,028 60	533	$86,756 70		
						..	.....	.....	.....	.....	.....	.....	3,351	25	.....	837 75	97	69 00		
						5 in	.....	.....	.....	.....	.....	331 02	.....	.....	.....	604 16	137	115 00		
							3,072	.....	.....	.....	.....	.....	.....	.....	.....	331 02	289	78 00		
																	397	78 00		
																	593	78 00		
																	534	78 00		
																	1,035	81 00		
	Diff. of cost of 110,240 brick, cost $3.	..	....	....	....	....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2,287	414 00		
																	499	2,500 00		
																	981	3,000 00		
																	496	1,600 00		
																	548	702 00	$153 25	
		3,065	4,069	397	2,176			25,514	22,323	$577 00	$2,280 75	$355 27	$2,8304			$95,103 53		$94,950 48	$153 25	$95,103 73

The squares assessed are—

	Feet.	in.
No. 433	350	2
434	206	3¼
435	486	0
436	254	0
437	274	4
438	274	8
439	274	8
S. of 439	235	0
462	305	2
464	173	5
465	425	0
466	274	4
467	255	4
468	274	8
469	274	8
470	235	0
471	235	0
471	235	0
472	314	3
Total frontage assessable	5,357	9¼

feet, which, divided into one-third of $140,547.71, is $46,849.23, and equals 8.74\frac{41}{100}$ per front foot.

Total cost of street		$95,103 73
Deduct sewer and water services		2,280 75
		$92,822 98
Total cost of sewers		64,760 36
Total cost		157,583 34
Add 5 per cent. for general expenses		7,879 16
		165,462 50
Deduct—		
Chargeable to the United States	11,716 14	
" " " District of Columbia, (front of square 472).	6,130 65	
" " " Washington & Georgetown Railway Co...	7,068 00	
		24,914 79
		$140,547 71
Charge two-thirds to general fund		93,698 48
" one-third to property-holders, being 8.74\frac{41}{100}$ per foot		46,849 23
		$140,547 11

204 *Aff'd't of J. H. Mattingly.—Filed Oct.* 19, 1872.

COUNTY OF WASHINGTON,
District of Columbia, to wit:

I, John H. Mattingly, on oath, say that I am a resident of the city of Washington, in said District, and am acquainted with the character of the improvements of Seventh street southwest, and observed closely from time to time the manner in which work upon the same was being conducted.

As the earth was filled in the sewer it was neither puddled nor rammed, in consequence of which fact it has settled and caused considerable depression in that portion of the wood pavement which lies immediately upon and over said sewer.

The bed of said wood pavement consists of sand, gravel, and earth combined, and is not more than three inches in depth throughout
205 the extent of said street, and was neither rammed nor rolled before said pavement was laid.

JOHN H. MATTINGLY.

Subscribed and sworn to before me this 19th day of Sept'r, 1872.
[SEAL.] CHAS. CONS. CALLAN,
Notary Public.

Stipulation.—Filed Oct. 19, 1872.

Supreme court of the District of Columbia.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity.

The counsel for the defendants, the District of Columbia and the Board of Public Works, hereby waives all irregularities in the filing and serving of copies of amendments to the complainants' bill.

WILLIAM A. COOK,
Att'y D. C. & B. P. W.

OCTOBER 19TH, 1872.

206 *Order to hear cause in gen. term.—Filed Oct.* 21, 1872.

Supreme court of the District of Columbia, Saturday, Oct. 19th, 1872.

MATTINGLY ET AL.
vs.
DISTRICT OF COLUMBIA ET AL. } 2910. Eq. doc., 12.

This cause coming on to be heard upon the application of complainants for an injunction under the amended bill filed October 1st, 1872, and the same being considered, it is, this 19th Oct., 1872, ordered that said motion be, and hereby are, certified to the court sitting in general term, there to be heard in the first instance.

By the court:

A. WYLIE.

207 *Exhibit A to answer to amended bill.—Filed Oct.* 26, 1872.

In supreme court of the District of Columbia.

MATTINGLY ET AL.
vs.
BOARD OF PUBLIC WORKS ET AL. } Equity.

James A. Stevenson, being duly sworn, deposes and says that in August, 1871, he was employed and appointed by the Board of Public Works to superintend and inspect the improvements then being made on 7th street west, from B street to the river, succeeding John H. Stevenson, who previously acted in that capacity.

Deponent further says that he acted as such inspector and superintendent from his appointment until the 20th of March, 1872, when that work was completed, and that during said time he was attending to his duties along the line of said work every day, except Sundays,
208 having his room and taking his meals on the street close by the work, and that the sewer was well and carefully constructed, and that the earth, as filled above it, was thoroughly puddled; and in laying the pavement, the natural road-bed being hard, was used, and on top of it was placed the required thickness of sand, which was rammed.

Such old material as was fit for use was used in laying the sidewalks, and the same was not charged for, and none of the old material was taken or used by the Board of Public Works for their own use, but much of it was taken and used by the property-holders on the street.

Deponent further says, he measured accurately the work as it progressed and made correct reports thereof to said board, and W'm
209 Forsyth also measured the work to test the accuracy of deponent's measurements. Deponent also says that he had instructions from the board to see that every part of the work was done in the best possible manner; and he did so, and says that he confidently believes that there is not a better built sewer in this District, or in the country, and that said sewer, as built, is not too large, if large enough, for the purposes required of it.

J. A. STEVENSON.

Subscribed & sworn to before me this 24th day of September, 1872.

R. J. MEIGS,
Clerk S. C. D. C.,
By R. J. MEIGS, J'r,
Ass't Clk.

210 EXHIBIT C.

Affidavit of W'm Forsyth.—Filed Oct. 26, 1872.

DISTRICT OF COLUMBIA, *ss:*

Before me appeared William Forsyth, who says, as appears from the records of the Board of Public Works, the cost of the sewer from the river to L street, or what is called by some the end of 7th street, was seven thousand eight hundred and twenty-three dollars, or about eleven dollars sixty-six cents per lineal front foot, the distance being 650 feet eight inches; that the part of the sewer was indispensable to make the sewer on 7th street available for its purposes, and the cost thereof unquestionable, fair, and reasonable.

He says he is one of the engineers of the Board of Public Works of the District of Columbia.

W'M FORSYTH.

Sworn and subscribed the 26th of October, 1872, before me.
[SEAL.] BENJAMIN N. MEEDS,
Notary Public.

211 *Answer of Dist. of Col. to amended bill.—Filed Oct. 26, 1872.*

In the supreme court of the District of Columbia, the 26th day of October, 1872.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity.

The separate answer of the District of Columbia to the amended bill of the complainants.

This defendant, now and at all times saving and reserving all manner of advantage and benefit of exceptions to the errors and insufficiencies of said bill, for answer thereunto says:

9 *a*, *b*, *c*. This part of the amendment contains no new matter, and is only an expansion or restatement of matters and things contained in the original bill, and which he submits has heretofore been sufficiently answered.

212 13. It is denied that the District of Columbia is insolvent, as alleged in this paragraph, and it is submitted that the averment that the money appropriated for special improvements by the legislative assembly has long since been used is immaterial.

14. The averments of this paragraph in relation to the expenditure of appropriations made by Congress are irrelevant.

15. The averments of this paragraph relate chiefly to the Board of Public Works, and for and on behalf of the District of Columbia require no answer.

16. What is true of the 15th paragraph is also true of this.

17. This paragraph also relates to matters concerning the Board of Public Works, and requires no answer from this defendant.

213 18. It is denied that any matter contained in the amended bill in relation to this defendant not hereinbefore referred, if any, is true. It is submitted to the honorable court that all the complainants' amended bill contained are matters which may be tried and determined at law, and with respect to which said complainants are not entitled to any relief from a court of equity, and it is hoped that this defendant, so far as the matters and things may relate to it, shall have the same benefit of this defence as if the same amended bill had been demurred to. It prays to be hence dismissed with costs and charges in this behalf most wrongfully sustained.

H. D. COOKE, *Governor.*

DISTRICT OF COLUMBIA, *ss:*

214 Henry D. Cooke, governor of said District, being duly sworn, says that he has heard read the above answer by him subscribed, and that the facts therein stated are true.

H. D. COOKE, *Gov'r.*

Subscribed & sworn before me this 26th day of October, 1872.

JOHN F. COOK, *J. P.*

Demurrer of B. P. W. to amend'd bill.—Filed Oct. 26, 1872.

In the supreme court of the District of Columbia, the 26th day of October, 1872.

GEORGE MATTINGLY ET ALS.
vs.
THE DISTRICT OF COLUMBIA ET ALS. } Equity.

The joint and several demurrer of Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Samuel P. Brown, and Adolf Cluss, composing the Board of Public Works of said District, to parts of the bill of the complainants.

215 These defendants, by protestation, not confessing all or any of the matters and things in the bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, demur to so much of the 13th paragraph of said bill as is in the words following, to wit:

"These complainants aver and charge that the said defendants have

long since used and expended the money heretofore appropriated by the said legislative assembly, for the cost of special improvements in said District."

And to the 14th paragraph thereof, which is as follows:

"14. These complainants further say that they are informed and believe that the entire amount appropriated by Congress, to pay the reasonable expenses theretofore incurred for paving roadways, and
216 arching and paving sidewalks in front of the property of the United States, in the District of Columbia, to wit, the sum of one hundred and ninety-one thousand hundred and twenty dollars, has been used and disbursed for paving, curbing, etc., in foront of other property of the United States than such as is located on Seventh street, or that part thereof lying between Maryland avenue and the Potomac River, and that none of said sum so appropriated is now available to pay for the work on the part of said Seventh street west, between Pennsylvania avenue and the river, referred to and brought in question in this case; and these complainants require said defendants to set forth and disclose particularly how much of said sum has been drawn and expended, specifically, for what purpose used and appropriated;
217 on what particular work, and in front of and adjacent to what particular work is the public property located, on account of which sum or sums may have been paid; and said complainants further require said defendants to disclose and set forth when such payment, and appropriation of such sums, so appropriated by the National Government, were made."

3. And to so much of the 15th paragraph thereof as requires an answer and discovery as to the specific duties imposed on the treasurer of said board.

And for cause of demurrer say that the averments made, and the discovery asked, as aforesaid, are irrelevant, and contain no matter of equity whereon this court can ground any decree, or give the complainants any relief as against these defendants.

Wherefore, and for other good causes of demurrer, these de-
218 fendants humbly crave the judgment of this honorable court as to the combination of said parties and matters, as appears in and from said parts of the bill as herein demurred to, and whether they are compellable, or ought to make any answer thereunto otherwise than as herein done; and they pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

H. D. COOKE.
ALEX. R. SHEPHERD.
ADOLF CLUSS.
JAMES A. MAGRUDER.

DISTRICT OF COLUMBIA, *ss:*

Before me personally came Henry D. Cooke, and, being duly sworn, depose' and say' that the foregoing demurrer is not interposed for delay.

H. D. COOKE.
ALEX. R. SHEPHERD.
ADOLF CLUSS.
JAMES A. MAGRUDER.

219 Subscribed and sworn to before me this 26th day of October, 1872.

JOHN F. COOK, *J. P.*

I certify in my opinion the foregoing demurrer is well founded in point of law.

WILLIAM A. COOK,
Sol. for Def'ts.

Motion to dismiss the motion for inj'n.—Filed Nov. 9, 1872.

In the supreme court of the District of Columbia.

MATTINGLY ET AL.
vs.
BOARD, &C.

In this cause the counsel for complainants come into open court and ask leave to withdraw and dismiss the rule to show cause for injunction, and to dismiss the motion for an injunction on the amended bill, and upon consideration thereof it is ordered and adjudged that the said rule is hereby discharged, and the motion dismissed, and an injunction on the amended bill denied.

220 *Replication.—Filed Nov. 29, 1872.*

In the supreme court of the District of Columbia, the 29th day of Nov., A. D. 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

The complainants hereby join issue with the defendants, and will hear the cause on bill, answer, and testimony against the defendants.

R. T. MERRICK,
T. A. LAMBERT,
Sol'rs for Comp'lts.

Motion to dismiss bill.—Filed Dec. 17, 1872.

In the supreme court of D. C.

MATTINGLY ET AL.
v.
DIST. OF COL. ET AL. } No. 2910. In eq.

The defendants in this cause move the court to dismiss the above suit, and assign as reason therefor that the plaintiff did fail to file
221 a general replication to the answers of the defendants within ten days after the filing of the said answers.

COOK, BOND & PHILLIPS,
Sol's for Def'ts.

Mess'rs MERRICK & LAMBERT, *Sol's for Compl'ts:*

GENT.: Please take notice that the defendants will move the court as above stated, on Saturday next, Dec. 21st, 1872, at 11 a. m., or as soon thereafter as counsel can be heard.

COOK, BOND & PHILLIPS,
Sol's for Def'ts.

DEC. 17, 1872.

Order for extension of time to take testimony.—Filed Dec. 28, 1872.

In the supreme court of the District of Columbia, the 28th day of December, A. D. 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

222 Ordered this 28th day of December, A. D. 1872, that the time for taking testimony on behalf of the complainants in the above entitled cause be and the same is hereby extended thirty days from this date.

By the court:

A. WYLIE.

Order overruling motion to dismiss amended bill.—Filed Dec. 28, 1872.

In the supreme court of the District of Columbia, the 28th day of December, A. D. 1872.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

This cause coming on to be heard upon the motion to dismiss the amended bill as for want of replication filed within the time provided by rule of court, in the presence of counsel for the complainants,
223 and the defendants respectively, upon being argued by counsel and duly considered by the court, and it appearing to the court that said motion is not proper to be granted, it is thereupon, this 28th day of December, A. D. 1872, by the court ordered that the said motion be and the same is hereby overruled.

By the court:

A. WYLIE.

Order extending time.—Filed Jan. 29, 1873.

In the supreme court of the District of Columbia, the 29th day of January, A. D. 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No 2910. Eq. doc. 12.

Ordered this 29th day of January, A. D. 1873, that the time for taking testimony in the above entitled cause be and the same is hereby
224 further enlarged till the 3d day of February next inclusive, provided that this enlargement of time shall not interpose with the right of the defendant to have the cause heard at the February term next.

A. WYLIE, *Justice.*

Appeal to gen. term.—Filed Dec. 28, 1872.

In the supreme court of the Dist. of Col'a.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } 2910. Equity.

The clerk will enter an appeal from the decision of the special term of the court, rendered this 28th day of December, 1872, overruling the motion of the defendants, to dismiss the bill of complaint for failure to file their replication within the prescribed period allowed by the rules of court.

W. A. COOK,
S. L. PHILLIPS,
Sol'rs for Defendants.

Appeal entered as directed.
By the clerk.

Motion to dismiss appeal from order.—Filed Jan. 30, 1873.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

The complainants, by their counsel, come and move the court to dismiss the appeal entered by the defendants from the order passed at special term on the 28th day of December, A. D. 1872, for the reasons following, to wit:

225 1. Because the allowance or refusal of said order was wholly within the descretion of the justice presiding at said special term of the court.

2. Because the merits of the said cause are not involved in said order.

R. T. MERRICK,
T. A. LAMBERT,
For Complainants.

Notice of motion to rehear appeal.—Filed Mar. 12, 1873.

In the supreme court of the D. C.

MATTINGLY ET AL.
vs.
DISTRICT OF COLUMBIA. } No. 48, general term. No. 2910, equity.

Mess'rs MERRICK & LAMBERT,
Sol'rs for Mattingly et al.:

You will please take notice that the undersigned will move the court in general term, on Saturday next, at 11. a. m. (15 March, 1873,)
226 for a rehearing of the appeal taken by the defendant in the above cause, on December 28th, 1872.

W'M A. COOK,
SAM'L T. PHILLIPS,
Sol's for Def't.

Motion for leave to file supplem'l bill.—Filed Sep. 13, 1873.

In the supreme court of the District of Columbia, the 13th day of September, A. D. 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

The complainants, by their solicitor and counsel, move the court for leave to file their supplemental bill of complaint in the above-entitled cause, because,

1. Of matter material to the issue involved in said cause, and occurring subsequent to the filing of the original and amended bills of complaint therein.

2. Of other material charges and averments in their said supplemental bill of complaint contained.

R. T. MERRICK,
Counsel.
T. A. LAMBERT,
Solicitor.

227 *Order: Leave to file supplemental bill.—Filed Sep.* 19, 1873.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

This cause coming on to be heard on motion for leave to file a supplemental bill in said cause, it is by the court, this 19th day of September, A. D. 1873, by the court ordered that leave be and hereby is granted the complainants to file said supplemental bill in said cause, the payment of the equal one-fifth annual installment of the assessment for special improvements in the said supplemental bill mentioned, to be made into this court on or before the 25th day of September, A. D. 1873.

D. C. HUMPHREYS,
Justice.

228 *Supplemental bill—Filed Sep.* 19, 1873.

In the supreme court of the District of Columbia, the 13th day of September, A. D. 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. }

To the supreme court of the District of Columbia, holding an equity court for said District:

The supplemental bill of complaint of the above-named complainants respectfully shows:

That, heretofore, they filed their bill of complaint in this honorable court against the above-named defendants, which said bill hath been amended by order of this honorable court, thereby praying, amongst

other things, that the said defendants, The District of Co-
229 lumbia and the said Board of Public Works and their successors in office, may be enjoined and restrained by the order of this honorable court from issuing certificates of indebtedness against the property of the complainants, on account of assessments for alleged special improvements on Seventh street, southwest, in the city of Washington, in said District; and for a reference to the auditor to this court, to state a proper account of the work upon said alleged improvements; to inquire into the manner in which the same has been done, and to take testimony in reference to the items of the aforesaid assessments, as in said bill of complaint is particularly set forth, to which bill the defendants answered. Other proceedings were had, and the cause stands
230 ready for hearing, as by the same proceedings, now in this court, will appear.

And the complainants, by way of supplement to their aforesaid bill of complaint, now charge, that since the filing of the said bill of complaint the wooden carriage-way upon said Seventh street, southwest, extending from B street south to Water street, in said city of Washington, and constituting a part of the said alleged special improvements, by reason of the careless and imperfect manner of its construction, and the infirm character of its foundation, hath proved grossly defective and inadequate to the purposes of a public street, and from time to time hath necessitated frequent and costly reparation throughout its entire extent, and that the same is now in many places broken, irregular,
231 and needing extensive repair; and the complainants further charge, that the sewer constructed in said street, and forming another of the alleged special improvements, hath proved to be insufficient for its purposes, and hath, by reason thereof, been the occasion of great loss and damage to the property of the complainants.

And the complainants further show that since the filing of the aforesaid bill the said defendant, The Board of Public Works, hath issued certificates of indebtedness against the aforesaid property of the complainants assessed respectively as aforesaid in denominations purporting to be equal to said respective assessments, which certificates bear interest until paid at the rate of ten per centum per annum, and by the
232 third section of the act of the legislative assembly of said District, entitled "An act prescribing the mode of assessment for special improvements, and providing for the collections thereof," approved August 10, 1871, and declared to be a lien upon the property on or against which they have been issued, as by reference to said act, a copy whereof is filed herewith, marked "Complainants' Exhibit No. 6," will appear; that the said legislative assembly of said District thereafterwards, to wit, on the 29th day of May, A. D. 1873, passed an act entitled "An act for extending the time of payment of special assessments, and for other purposes," whereby in the third section thereof it is provided in words following, to wit, "that the time for paying all assessment certificates
233 which have been or may be issued by the Board of Public Works under said act of the legislative assembly of August 10, 1871, shall be extended so that amount of each certificate shall be payable in five equal annual instalments from the date of said certificates, with interest at the rate of ten per centum per annum until paid," etc., as by reference to said act, a copy whereof is herewith filed, marked "Complainants' Exhibit No. 7," will appear; that thereafterwards, to wit, on the 11th day of September, A. D. 1873, the complainants being advised and well believing that the said third section of the said last-mentioned act of the aforesaid legislative assembly was designed to apply and actually doth

apply to the manner of paying the said several certificates of assess-
234 ment, heretofore as aforesaid issued against their said property, did by their counsel and in writing, under their solemn protest, make lawful tender of the respective equal one-fifth annual instalments now as aforesaid claimed to be due and payable of the said several certificates the Board of Public Works, through one George W. Beall, its appointed assessor and collector, as will appear, reference being had to the copy of said protest and tender of payment herewith filed, marked "Complainants' Exhibit No. 8." And the complainants well hoped that no disputes would have arisen touching the said payment of the said respective equal one-fifth instalments, but that the said defendant, the Board of Public Works, would have accepted the reasonable tender of the com-
plainants so as aforesaid made, as in conscience and equity the
235 said defendant ought to have done, but so it is that the said defendant, by its assessor and collector, the aforesaid George W. Beall, did then and there absolutely refuse and still doth refuse to accept the said tender of the complainants. And the complainants now offer, protesting as aforesaid that nothing is now due from them, to bring into court and pay the said equal one-fifth instalment now as aforesaid claimed to be due, whenever the court shall by its order require them so to do.

And the complainants further aver and charge, that notwithstanding the aforesaid provision of the act of the legislative assembly of May 29, 1873, the said defendant, the Board of Public Works, in derogation of the just rights of the complainants, and in manifest disregard
236 of law, now doth demand of the complainants payment in full of the aforesaid several certificates of assessments, and have actually served upon the complainants, individually, notices declaring that the several amounts of their said respective assessments are due, one year having expired, and warning them that if the same be not paid at the office of the said Board of Public Works, on or before the 15th day of September, A. D. 1873, the said defendant, the Board of Public Works, will proceed to advertise and sell the property to pay the alleged several indebtedness of the complainants, as will appear, reference being had to one of said notices filed herewith, marked "Complainant's Exhibit No. 9," to the manifest wrong and injury of the com-
plainants in the premises.

237 To the end, therefore, that the said defendants may answer as well the matters charged in the aforesaid bill of complaint as in this supplemental bill, and that the complainants may have such relief against them as is prayed in their aforesaid bill of complaint against the defendants, and that the said defendant, the Board of Public Works, its officers and agents, be enjoined and restrained by the order of this honorable court from so as aforesaid advertising and exposing to sale the said property of the complainants,

And that the complainants may have such further and other relief in the premises, as the nature of their case shall require, and to this honorable court shall seem meet and proper to grant, may it please, etc.

J. VAN RISWICK.
T. A. LAMBERT,
Solicitor.
R. T. MERRICK,
Counsel.

238 We do solemnly swear that we have heard read the supplemental bill by us subscribed, and know the contents thereof, and that the

facts therein stated upon our personal knowledge are true, and that the facts therein stated upon information and belief we believe to be true.

J. VAN RISWICK.
G. E. KIRK.
C. B. CHURCH.

Sworn to and subscribed before me this 15th day of September, 1873.
[SEAL.] E. L. SCHMIDT, *J. P.*

239 EXHIBIT No. 8.

Protest and tender of payment.

In the supreme court of the District of Columbia, the eleventh day of September, A. D. 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc.

Take notice that the undersigned, solicitor and counsel of certain owners and holders of lots and parts of lots in certain squares of ground fronting on the line of Seventh street, southwest, between B street south and the Potomac River, complainants in the above-entitled cause, for and on behalf of said owners, individually, do hereby solemnly protest against the bills heretofore rendered on account of alleged special improvements in front of and adjacent to the said several pieces or parcels of ground, for illegality and overcharge; and subject to said protest, the said
240 solicitor and counsel expressly reserving for and on behalf of each and every of the said property-owners his and her right to recover any payment or payments, or the fractional part of any payment that may hereafter appear to have been illegally exacted of or excessively charged against him or her; and being thereunto duly authorized by the said several owners of said property, in compliance with the provision of the third section of the act of the legislative assembly of the District of Columbia entitled "An act for extending the time of payment of special assessments," &c., and approved May 29, 1873, do hereby tender and hold themselves ready and willing, on behalf of the said owners and holders of said property respectively, to pay into your hands, as
241 the assessor and collector of the Board of Public Works of the District of Columbia, the one-fifth part or installment now due and payable of the respective amounts so as aforesaid assessed against the said lots and parts of lots on said Seventh street, southwest, for and on account of the said alleged special improvements.

R. T. MERRICK,
Counsel.
T. A. LAMBERT,
Solicitor.

TO GEO. W. BEALL, Esq.,
Assessor and Collector Board of Public Works, District of Columbia.

Complainants' Exhibit No. 9.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Assessor's Office, Washington, D. C., September 1st, 1873.

THOMAS FAHEY:

You are hereby notified that the amount of your assessment for

242 improvement of 7th s't from B to river is due, the time allowed by law, viz, one year, having expired. If the same is not paid at this office on or before September 15, 1873, the Board of Public Works will proceed to advertise and sell the same to pay your indebtedness.

GEO. W. BEALL,
Assessor and Collector Board of Public Works.

Affidavit of service of copy of supplemental bill.—Filed Sep. 17, 1873.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

I, Thomas Edwards, on oath say that I am a bailiff of the said
243 supreme court; that heretofore, to wit, on Saturday the 13th day of September, A. D. 1873, the solicitor in the above-entitled cause, T. A. Lambert, esq., placed in my hands certain papers entitled respectively as follows, to wit: Copy of supplemental bill, and copy of motion for leave to file supplemental bill and notice of hearing, and entitled as of said cause, with instruction to serve the same upon William A. Cook, esq.; that thereupon I called with said papers at the office of the said William A. Cook, esq., in the Columbia Buildings, in the city of Washington, in said District, but did not at the time find him within; that thereafterwards, to wit, on the day aforesaid, at the hour of 4 p. m., I again called at the said office of the said William A. Cook, and
244 finding him therein duly served all of said papers upon him by placing them in his hands, and acquainting him with their character; that the said William A. Cook did then and there satisfy himself of the nature of said papers, and did then and there accept service thereof by remarking, "All right," and retaining possession of said papers.

JAMES EDWARDS.

Subscribed and sworn to before me this 17th of Sept'r, 1873.
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

Restraining order.

A supplemental bill praying an injunction against the adver-
245 tisement and sale of property therein referred to is filed. Hearing is fixed for Friday, September 26th, 1873, at 11 o'clock a. m.
By order of the court.

D. C. HUMPHREYS,
Justice, &c.

1873. SEPT. 20TH.

Attest:

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Clerk, &c.*

Service accepted.

WILLIAM A. COOK,
Att'y D. C.

SEPT. 20, 1873.

Subpœna.

In the supreme court of the District of Columbia, Sept. 20th, 1873.

MATTINGLY ET AL., COMPLAINANTS,
against
THE DISTRICT OF COLUMBIA ET AL., DEFENDANTS. } No. 2910. Eq. doc. 12.

The President of the United States to the District of Columbia, H. D. Cooke, A. R. Shepherd, James A. Maguire, A. B. Mullet, S. P. Brown, and Geo. W. Linville, Albert Gleason, defendants:

246 You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return.

Issued Sept. 20, 1873; returned Sept. 20, 1873. Served the def'ts & served copy of notice for ju'g't on same by W. A. Cook, their attorney, accepting service.

A. SHARP,
Marshal.

SEPT. 20, 1873.

247 *Notice to rescind order.—Filed Sep.* 30, 1873.

In the supreme court of the District of Columbia, the 30th day of September, 1873.

GEORGE MATTINGLY ET ALS.
v.
THE DISTRICT OF COLUMBIA. } Equity. 2910.

And now come the defendants, by W. A. Cook and S. R. Bond, their solicitors, and move the court to rescind the order passed in this cause on the 26th day of September, 1873, for the following among other reasons:

1. Because no notice was given to said defendants, or their solicitors, of any motion or intention to ask a modification of the order passed on the 19th instant, requiring the payment into court of the one-fifth of the special assessments on the property of the defendants.

2. Because the said payment not having been made, the said
248 defendants and their solicitors were led to believe, and did believe, that no further order would be granted in behalf of the complainants until that consideration had been complied with.

3. Because W. A. Cook, the attorney for the defendants, the District of Columbia and the Board of Public Works, was sick and unable to attend court on the 26th instant, the day when the order complained of was made, and for some days previous.

W. A. COOK,
S. R. BOND,
Def'ts' Sol'rs.

249 *Petition to admit as parties compl't.—Filed Oct.* 3, 1873.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

The petition of M. Foley, H. H. Dent, W'm R. Riley, Ja's H. Whitmore, J. W. Reed, Moses Solomon, Louis Dow, Vincent Kirk, George J. Hall, John Thomas, Henry Been, J. E. Crompton, Geo. A. Sheckells, Geo. B. Smith, Dan'l McFarlan, John A. Schropp, J. Miller, G. Willan, J. C. Cook, R. G. Polley, Sam'l H. Fowkes, Ann R. Croggan, Sarah Page, Cravin Ashford, E. F. Zell, James Halley, Alex. McKencher, John Clark, L. H. Berryman, W'm Gunton, W. B. Jenken, B. O. Sheckells, J. G. Smith, respectfully shows that they are residents of the District of Columbia, and are individually and severally owners in fee-simple or otherwise seized and possessed of certain lots and
250 parts of lots of ground fronting and abutting upon the lines of Seventh street, southwest, between B street south and the Potomac River in the city of Washington, in said District; that in common with the other owners of property on said Seventh street, southwest, the petitioners have lately been assessed by the Board of Public Works of the said District, large amounts of money for and on account of alleged special improvements made and done upon said street in front of and adjacent to their said property; that the petitioners regard said assessment as excessive and they are advised that the same has been made in contravention of law, and is therefore void; that they adopt the allegations contained in the original and supplemental bills of complaint heretofore filed in the above-entitled cause and are willing to con-
251 tribute their share to the expense thereof. To the end, therefore, that they be entitled to the relief in the said original and supplemental bills prayed, the petitioners, uniting together in this proceeding to avoid multiplicity of suits, pray that they be made parties complainant therein.

And as in duty bound the petitioners will ever pray, &c.

JOSEPH W. REED.

R. T. MERRICK, *Counsel.*
T. A. LAMBERT, *Sol'r.*

We do solemnly swear that we have read the petition by us subscribed and know the contents thereof; that the facts therein stated upon our personal knowledge are true, and that the facts therein stated upon information and belief we believe to be true.

JOSEPH W. REED.

Sworn to and subscribed before me this 3d day of October, A. D. 1873.

SAM'L C. MILLS, *J. P.* [SEAL.]

252 *Decree taking supplemental bill for confessed.—Filed Nov. 7, 1873.*

In the supreme court of the District of Columbia, the 7th day of November, 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2010. Eq. doc. 12.

This cause coming on to be heard upon motion to take the supplemental bill for confessed against the defendants, and it appearing to the satisfaction of the court that upon the filing of said supplemental bill subpœnas were sued out, issued, and served thereof effected upon the said defendants on the 20th day of September, A. D. 1873, and that the said defendants have, notwithstanding, hitherto failed to appear and answer unto the several matters and things in said sup-
253 plemental bill averred, it is, this seventh day of November, A. D. 1873, thereupon, upon consideration thereof by the court, ordered and decreed that the said supplemental bill be, and the same hereby is, taken for confessed against the said defendants.

D. C. HUMPHREYS,
Justice.

254 *Order authorizing att'y Dist. of Col. to receive money deposited by order of court.—Filed Nov. 11, 1873.*

In the supreme court of the District of Columbia.

MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMAIA.

And now, to wit, this eleventh day of November, 1873, on motion, the decree heretofore made, on the 3rd day of October, 1873, in this case is hereby modified, so as to read that the District of Columbia, or the Board of Public Works, by the attorney of the District, or any proper officer or agent, be authorized to draw from the court, and without prejudice in the final hearing of the case, the money paid in by the complainants under the order of court, and complainants to be credited with said sums, respectively, and that the proper officer of the court,
255 upon payment as aforesaid, take the receipt of the said attorney, or the proper officer or agent of said District or board, for the same.

D. C. HUMPHREYS, *Justice.*

Separate ans. of Dist. of Col. to supplemental bill.—Filed Nov. 19, 1873.

In the supreme court of the District of Columbia, this 18th day of November, 1873.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } Eq. 2910.

The separate answer of the District of Columbia, by its governor, Alexander R. Shepherd, and under its seal, to the supplemental bill of the complainants, or to so much thereof as it is deemed necessary to answer.

This defendant, saving and reserving to itself now and at all
256 times hereafter all manner of advantage and benefit of exception to the many errors and insufficiencies in the said bill of com-

plaint contained, for answer thereunto, or unto so much or such parts thereof as it is advisable for this defendant to make answer, says:

That the allegations in said bill in reference to the character of the work referred to therein are incorrect; and while making this denial it is submitted that this part of the supplemental bill is only a reiteration of matters contained in the original and amended bill, and as such improper.

It is also denied that the statement of the meaning and purpose of the law of the legislative assembly of the District, entitled "An act for extending the time of payment of special assessments and for
257 other purposes," approved May 26th, 1873, as presented by the complainants in the supplemental bill, is correct; and a copy of said law is hereto annexed and made part of this answer, so that the same may be properly understood and expounded by the court; and this defendant says and submits that it has no interest in said suit in the matter of the assessments and certificates against the complainants' property; and it further says and submits that it is improperly made a party defendant to the supplemental bill in this case, and the complainants improperly joined, their interests being separate and distinct; and it further says and submits that the matters complained of are all matters which are cognizable by a court of law, and not matters
258 proper for the adjudication of a court of equity. And this defendant prays that it may have the same benefit of these defences as if it had demurred to said complainants' bill, and that it may be hence dismissed with costs and charges in this behalf most wrongfully sustained.

ALEX. R. SHEPHERD.

Test:
[SEAL.] RICHARD HARRINGTON,
Sec'y Dist. of Columbia.

DISTRICT OF COLUMBIA, *ss:*

I, Alexander R. Shepherd, governor of said District, do solemnly swear that I have read the answer by me subscribed, and know the contents thereof, and that the matters therein stated on my perscnal knowledge are true, and that the matters therein stated upon
259 information and belief I believe to be true.

ALEX. R. SHEPHERD.

Subscribed and sworn to before me this 18th day of November, 1873.
[SEAL.] SAM'L R. BOND,
Notary Public.

Answer of Board Public Works to supplemental bill.—Filed Nov. 19, 1873.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET ALS. *v.* DISTRICT OF COLUMBIA ET ALS. } Equity. No. 2910.

The separate and joint answer of Alexander R. Shepherd, James A. Magruder, Adolf Cluss, Henry A. Willard, and J. B. Blake, constituting and composing the board of public works of the District of Columbia, to the supplemental bill of complainants, or to so much thereof as is not demurred to.

260 These defendants, now and at all times hereafter reserving all

manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, say:

1. That the allegations in said bill in reference to the character of the work referred to therein are untrue, and submit that this part of the supplemental bill is little else than a repetition of the matter contained in the original bill, and as *is* such is improper and inadmissible.

2. They admit that certificates of indebtedness have been issued against the property of the complainants since the filing of the original bill, and they say that these were issued in accordance with the
261 act of the legislative assembly of said District entitled "An act prescribing the mode of assessments for special improvements, and providing for the collection thereof," approved August 10th, 1871, and agreeably to "An act to provide a government for the District of Columbia," approved February 21, 1871, and long prior to the 29th day of May, A. D. 1873; and they further say that said certificates before the last-mentioned day, for good and valuable considerations by the District of Columbia and the Board of Public Works thereof received, had passed into the *the* possession of the First National Bank of New York, and before said day, and at the time of the filing of said supplemental bill, were in the possession of said First National Bank of New York as bona-fide holders thereof; and that agreeably to the pro-
262 visions of the said act of the legislative assembly, at the expiration of one year from the date of said certificates, upon the application of the holder thereof, the said board are required to sell at public auction the property against which the assessments and certificates exist, or so much thereof as may be necessary to pay the assessments as authorized by said acts, after advertisement for three successive week' in the regular issue of a newspaper published in said District, with the right on the part of the owner of the property to redeem the same within two years by paying the purchase-money and fifteen per centum per annum.

It is admitted that on or about the 29th day of May, 1873, an act was passed by the legislative assembly of said District in regard to
263 extending the time for the payment of special assessments, and they say that the act referred to is entitled "An act for extending the time of payment of special assessments, and for other purposes," approved May 26th, 1873; and they deny that 3d section of said act was designed to apply, and does apply, to the manner of paying the said several certificates of assessments issued against the property of the complainants, and they say that said section could not have been intended to embrace said certificates, nor does it so apply when at the date of the approval of said act said certificates were in the hands of bona-fide purchasers and holders; and they further say that the 4th section of said act relates to said certificates, and other similar
264 certificates, and, among other things, expressly provides that certificates issued before its passage, and not paid in full at the expiration of one year from their date, shall, on the request of the holders, and on due assignment thereof, be purchased by the commissioners of the sinking-fund, and be held and collected on their account, as provided in sections 2 and 3 of the act, and that, if necessary to provide means for the purchase of such certificates upon requisition of said commissioners, the said board are authorized and required to make an additional issue of certificates, similar to those authorized by section 1st of the act, not to exceed the amount of the purchased certificates. And they say that while said section 4th provides for an extension of
265 the time of payment of the certificates mentioned in it, it does

so only conditionally, viz, provided the holders shall request the said commissioners to purchase the same, and not otherwise. And they further say that no such request has been made by the holder of the certificates issued against any of the property of the complainants referred to or mentioned in the supplemental bill; and that without such request, and the consent of the holders of said certificates, must be paid and collected as provided in said act of August 10th, 1871.

They admit that the counsel of the complainants did present to and leave with George W. Beall, appointed assessor and collector of the Board of Public Works, the paper, of which a copy is filed as Ex-
266 hibit No. 8 to the supplemental bill, but they deny that the complainants made any lawful tender of payment of the said assessments, or of any part or instalment thereof.

They admit that they refused and still refuse to accept the payment of a one-fifth part or instalment of said assessments, and say they have no legal right to accept the same, as heretofore stated.

They deny that, in derogation of the just rights of complainants and in manifest disregard of law, they have demanded payment in full of the certificates issued against the property of the complainants.

They admit that notices have been served upon the complainants
267 setting forth that amounts of the certificates are due, and that unless they are paid the property against which the assessments exist will be sold, a true copy of which notices is attached as Exhibit No. 9 to the supplemental bill.

And for further answer and a fuller statement of all the facts of the case, they refer to their answers to the original and amended bill of the complainants, and the affidavits and exhibits connected therewith.

And it is submitted to the honorable court that all the matters in the complainants' bill contained are matters which may be tried and determined at law, and with respect to which said complainants are not entitled to any relief from a court of equity, and it is hoped that
268 these defendants, so far as the matters and things may relate to them, shall have the same benefit of this defence as if the said supplemental bill had been demurred to.

And it is further submitted that the matters and things set forth in said supplemental bill which were not set forth in the original and amended bills relate to a different subject-matter than that of the original and amended bills, and should be embraced in a new and separate bill.

And they pray to be hence dismissed, with costs and charges in this behalf most wrongfully sustained.

ALEX. R. SHEPHERD.
JAMES A. MAGRUDER.
ADOLF CLUSS.
H. A. WILLARD.
JNO. B. BLAKE.

269 DISTRICT OF COLUMBIA, *ss:*

We, Alexander R. Shepherd, James A. Magruder, Adolf Cluss, H. A. Willard, and *James* B. Blake, solemnly swear that we have heard read the answer by us subscribed, and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and that the facts therein stated upon information and belief we believe to be true.

ALEX. R. SHEPHERD.
JAMES A. MAGRUDER.
ADOLF CLUSS.
H. A. WILLARD.
JNO. B. BLAKE.

Subscribed and sworn to before me this eighteenth day of November, A. D. 1873.

[SEAL.]

SAM'L R. BOND,
Notary Public.

270 *Order allowing First Nat'l Bank to come in as def't & to ans.—Filed Nov.* 19, 1873.

In the supreme court of the District of Columbia.

MATTINGLY & OTHERS
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Equity.

On motion of Enoch Totten, esq., solicitor, &c., it is this 19th day of November, 1873, ordered that the First National Bank of New York have leave to come in as a party complainant or defendant in this cause, without prejudice to either party, and file such pleadings therein as its interests may require and as it may be advised, within ninety days. This order reserving all rights to the present parties complainants and defendants as to the regularity of this order until the final hearing.

D. C. HUMPHREYS,
Justice.

271 *Order vacating pro confesso under supplemental bill, & allowing answer thereto filed.—Filed Nov.* 19, 1873.

In the supreme court of the District of Columbia the 19th day of November, 1873.

GEORGE MATTINGLY ET ALS.
v.
THE BOARD OF PUBLIC WORKS ET ALS. } Equity. No. 2910.

This cause coming on to be heard, upon motion of the defendants, The District of Columbia and The Board of Public Works, to vacate and set aside the decree pro confesso upon complainants' supplemental bill, passed in this cause on the 8th instant, and for leave for said defendants to file their answers:

It is, this 19th day of November, 1873, ordered, adjudged, and decreed that said decree pro confesso be, and the same is hereby, vacated and set aside, and leave is hereby given to said defendants to file their answers to said supplemental bill herewith submitted.

D. C. HUMPHREYS,
Justice.

272 *Replication.—Filed Feb.* 12, 1874.

In the supreme court of the District of Columbia.

GEORGE MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 2910. Eq. doc. 12.

The complainants hereby join issue with the defendants, The Board of

Public Works and the First National Bank, and will hear the cause on original and supplemental bills, the answers, and testimony.

T. A. LAMBERT,
Sol. for Compl'ts.

Cause certified to gen. term, M'ch 10, 1874.

MATTINGLY ET AL.
vs.
THE DISTRICT OF COLUMBIA. } 2910. Equity.

It is ordered, this 10th of March, 1874, that the above cause be, and hereby is, certified to the general term, to there be heard in the first instance.

By the court.

273 *Decree in gen'ral term, May* 12, 1874.

In the supreme court of the District of Columbia.—In general term, May 12th, 1874.

GEORGE MATTINGLY
vs.
THE DISTRICT OF COLUMBIA. } 2910. Equity docket 12.

This cause came on to be heard on this 12th day of May, 1874, and was submitted to the court by the counsel for the parties on both sides; whereupon it is ordered, adjudged, and decreed that the bill of complaint be, and the same is hereby, dismissed with costs.

From this decree, complainants, in open court, pray and are allowed an appeal to the Supreme Court of the United States.

By order of the court.

Clerk's certificate.

CLERK'S OFFICE, *Supreme Court of the District of Columbia:*

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 20th day of March, 1875.

R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 62. George Mattingly, George E. Kirk, Henry K. Randall, et al., appellants, vs. The District of Columbia et al. District of Columbia sup. court. Filed 2nd April, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 8.

GEORGE MATTINGLY *et al.*, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA, APPELLEES.

On rehearing upon appeal from the Supreme Court of the District of Columbia.

ADDITIONAL ASSIGNMENT OF ERROR.

The proprietors of property adjacent to the streets and avenues of the city of Washington, are not liable for the costs of grading and improving such streets and avenues; but the Federal Government is required to pay for such grading rnd improving under the deeds of the 29th July, 1791, by which the fee simple title to said streets and avenues, was conveyed to the United States.

Respectfully submitted,

R. T. MERRICK,
T. A. LAMBERT,
Of Counsel for Appellants.

Authorities upon the Foregoing Proposition.

Deed from Proprietors to Trustees, Burch's Digest, p. 330.
Davis' Laws of the District of Columbia, p. 60.
Van Ness *vs.* The City of W. and The U. S., 4 Peters, 275.
Cohens *vs.* The State of Virginia, 6 Wheaton, 425.
Acts of Maryland and Virginia Legislatures and of The Congress of The United States in regard to establishing a Permanent Seat of Government, Burch's Digest.
Act of Congress, March 3d, 1803.

In the Supreme Court of the United States.

GEORGE MATTINGLY *et. al.*, *Appellants*,
vs.
THE DISTRICT OF COLUMBIA, *et. al.*, *Appellees*. } No. 62.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF APPELLANTS.

LAMBERT & DARLINGTON,
R. T. MERRICK,
Solicitors and of Counsel for Appellants.

In the Supreme Court of the United States.

GEORGE MATTINGLY, *et al*, *Appellants.*
vs. } No 62.
THE DISTRICT OF COLUMBIA, *et al.*, *Appellees.*

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF APPELLANTS.

Statement.

May 9th 1870, the board of aldermen and board of common council of the city of Washington authorized the Mayor to cause the construction, in Seventh street, southwest, of a barrel sewer three feet inside diameter, commencing at the river and running north to south E street, and continuing the same to the south side of Virginia avenue, two feet inside diameter.

June 10th 1870, the same authority prescribed the paving of the carriage-way of Seventh street from B to Water street south, with a wood pavement.

March 28, 1871, the ordinance providing for the construction of a sewer was so far amended as to require the sewer to be constructed on each side of Seventh street (in lieu of the centre, as provided in said act) with the most approved title, and each not to be more than two feet inside diameter from the river to the south side of E street south, and eighteen inches inside diameter from the last named point to the south side of Virginia avenue.

The sewers were to be built under the direction of the superintendent of sewers, carriage-ways, &c., superintendence of the commissioner of the Seventh ward, and two assistant commissioners, to be appointed by the mayor; the carriage-way to be paved under the superintendence provided by law.

March 30th, 1871, proposals having been submitted and accepted, a contract in writing, with specifications attached, was entered into and executed by the Mayor, M. G. Emory, and the defendant, George W. Linville, for constructing the sewer and laying the pavement in conformity with the ordinances and amended ordinance aforesaid.

Vide printed record pp. 8, 9, 10, 11 and 12.

June 1st, 1871, the corporation which had been created by act of Congress of February 21, 1871, under the name of the District of Columbia, to succeed the three municipalities of Washington City, Georgetown and the Levy Court entered upon the discharge of its functions.

Section 37 of the organic act created a Board of Public Works, which "shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys and sewers of the city and all other works which may be intrusted to their charge by the Legislative Assembly, or by Congress. They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property holders, in pursuance of law, for the improvement of streets, avenues, alleys and sewers, and roads, and bridges, and shall assess in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefitted by the improvements authorized by law and made by them a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected.

The following were among the most important limitations to its authority:

"All contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District; and said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money, except in pursuance of appropriations made by law and not until such appropriations shall have been made. (16 U. S. St. 426.)

Section 15 prescribes: "That the Legislative Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor uthorize the payment of a claim, or part thereof, hereafter created against the District under any contract or agreement made without express authority of law; and all such unauthorized agreements or contracts shall be null and void. (Id. 423.)

Section 40 provided "That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date * * * but all laws and ordinances of said cities, respectively, and of the levy court, not inconsistent with this act shall remain in full force until modified or repealed by Congress or the Legislative Assembly of said District: * * * *Provided*, That the charters of said cities, severally, and the powers of said levy court, shall be continued for the following purposes, to wit: * * for the enforcement of all contracts made by said cities respectively, or by said levy court. (Id. 428.)

Work having been commenced under and pursuant to the foregoing contract and ordinances of the municipality of Washington, the assessment to be made in payment therefor was altered by act of Congress of April 20, 1871, to conform to the provisions of the 37th section, just quoted; of the

constituent act of February 21, 1871. (17 U. S. St. 10.) In all other respects the ordinances in question were left intact and by virtue of the above recited 40th section of the last mentioned act, it is submitted, that they are in operation now as they were upon the days of their respective enactment.

Pending the execution of the foregoing contract and despite the existence of the above recited laws, and ordinances, on the 3d day of July, 1871, an order purporting to emanate from the Board of Public Works and signed by one William Forsyth, as its first assistant engineer, directed Linville to "build the sewer in Seventh street, southwest, in the following manner, viz: From the canal to G street, put down 18 inch Scotch pipe on both sides of the street; from L street to the point where the sewer discharges into the river build a brick sewer of six feet inside diameter. (Record p. 12.)

For this radical change in the termini, dimensions and resulting cost of the sewer in question no antecedent appropriation had been made by the Legislative Assembly; no contract in writing had been made by the Board of Public Works. The ordinances authorizing the work had been inspired by the wishes and were conformed to the need and requirements of the property holders upon whom the expense of the improvements must fall. The latter had been carefully estimated, and it is not believed that, had the work been done pursuant to the contract of March 30, the assessment, as prescribed by the act of Congress of April 20, 1871, would have exceeded the sum of two dollars and fifty-three cents per front foot. (Record p. 45.)

The change of plan arbitrarily made by the Board of Public Works was as little justified by the acquiescence as it had been sanctioned by the expressed wishes of the owners of property adjoining and specially benefitted. (Record p. 36.) Neither was it the province of the board, acting merely as the successor of the superintendents

formerly intrusted with the ministerial duty of directing performance of the work to exercise the judicial functions involved in the prescribed modification.

In August, 1872, notices were served by the Board of Public Works upon the owners of real estate abutting upon Seventh street, southwest, advising them that an assessment at the uniform rate of eight dollars and seventy-one cents 41-100 per front foot of said real estate, had been levied to defray the one-third cost of the improvements in question; that if the amount assessed against each individual on the foregoing basis, should not be paid within thirty days from the date of notice a certificate of indebtedness would issue therefor against his real estate; that, by act of the Legislative Assembly approved August 10, 1871, said assessment and certificate of indebtedness were declared to be a lien upon said real estate, and that if said certificate, with interest at the rate of ten per cent. per annum should remain unpaid for one year, the said Board of Public Works, upon the application of the holder of said certificate would proceed to sell said real estate, or a proper part thereof.

On the 11th day of September, 1872, the complainants, forty-four in number, on behalf of themselves and all other owners of property along the lines of Seventh street, southwest, filed their original bill in this cause against the District of Columbia, the Board of Public Works and the contractors, George W. Linville and Albert Gleason. On petition, thirty-three were afterwards added to the list of complainants. (Record p. 68.) After setting forth the foregoing facts and averring particulars wherein the work was defective, the items of expenditure excessive, and the assessment so, as aforesaid, made upon the property of the complainants, fraudulent, excessive and illegal, the latter ask for:

1. An injunction against the issuance of the certificate of indebtedness.

2. A decree avoiding the assessment as being illegal.

3. An injunction against the receipt by Linville and Gleason, or the payment by the District, or the Board of Public Works, of anything whatever on account of said work.

4. An account. (Record pp. 1, 12.

5. General relief.

Affidavits in support of the application for interlocutory injunction accompanied the bill, and will be found at pp. 13, 16, of the Record.

Two demurrers, the one for misjoinder of complainants, the other for want of equity in the fourth section of the bill, in addition to an answer to the whole of the latter pleading, were, thereupon, interposed by the Board of Public Works. The answer, after attempting to justify the act of the Board in directing the alteration in the plan of improvement, confesses the entire cost thereof to have been $157,583.34, the one-third of which or $46,849.27 it claims to be chargeable against private property adjoining, and especially benefitted by said improvement. (Record pp. 19, 21.)

The answer of the District of Columbia is little else than a disclaimer founded upon the curious theory, then popular with some, that the Board of Public Works was an independent, co-ordinate entity, scarcely less than sovereign, irresponsible in itself and wholly incapable of affecting others with liability. (Ib. p. 25.)

The several answers of the defendants, Linville and Gleason, defend, generally, the character of the work done, and deny the existence of fraud or collusion. (Ib. pp. 26—35.

October 1st, 1872, the complainants filed their amended bill setting forth, with greater particularity, the extraneous facts, and circumstances relied upon to exhibit the total invalidity of the apparently valid proceedings of the Board of Public Works in making the aforesaid assessment. (Id. 37—45.)

The answer of the Board to this amended bill will be found at p 47 of the printed record.

September 19th, 1873, on leave of the court, the complain-

ants filed a supplemental bill wherein, after setting forth the fact that certificates of indebtedness had been issued, *pendente lite*, by the Board of Public Works; that the latter had threatened to make sale of their property in satisfaction of said certificates, and that the improvements upon said Seventh street had proved to be grossly defective, they pray for an injunction against the aforesaid threatened sale of their property. (Id. 62—4)

The answer of the Board of Public Works admits the issuance of the certificates of indebtedness and discloses that, for a good and valuable consideration, by it and the District of Columbia received, the said certificates have passed into the possession of the First National Bank of New York. The answer alleges, furthermore, that, at the expiration of one year from the date of said certificates, upon application of the holder or holders, the said Board are required, by Act of the Legislative Assembly, approved August 10th, 1871, to sell, at public auction, the property against which the assessment and certificate exist. (Id. 70—2.)

November 19th, 1873, the First National Bank of New York, on its own motion, became a party defendant to the cause. (Id. 73)

January 29th, 1874, the answer of the bank, admitting the purchase, and exhibiting the numbers and respective amounts of the certificates of indebtedness, was filed. This pleading having, by inadvertence, been omitted from the transcript of the record, is printed separately, and will, by consent and the permission of the court, be taken as part of the printed record.

From the decree of the General Term sustaining the demurrers of the Board of Public Works, and dismissing the original and supplemental bills, this appeal is taken.

ASSIGNMENT OF ERRORS.

1. That the Court erred in sustaining the demurrer for misjoinder of complainants.

2. That the Court erred in sustaining the demurrer for want of equity in the fourth paragraph of the original bill.

3. That the Court erred in not holding that the demurrers had been overruled by the answer of the Board of Public Works.

4. That the Court erred in not restraining the issuance of the certificates of indebtedness.

5. That the Court erred in not decreeing the assessment to have been void for illegality, excess and fraud.

6. That the Court erred in not restraining the defendants Linville and Gleason, from receiving, and the Board of Public Works, or the District of Columbia from paying, any sum or sums of money on account of, or in settlement for work done in the improvement of Seventh street southwest.

7. That the Court erred in not allowing the prayer of the supplemental bill.

8. That the Court erred in dismissing the aforesaid original and supplemental bills.

Points and Authorities.

1.

Courts of Equity are governed by no inflexible rule respecting the joinder of parties.

Murray, v. Hayes, 1 Barb. Ch. 59.

It is their aim to do complete justice, and, with that view, to embrace in the final decree all persons, however unconnected, who may have a common interest centering in the point at issue. Upon this principle rests the vindication of the ordinary judgment creditors' bill.

Brinkerhoff v. Brown 6, Johns. Ch. 150.

Many of the reported cases afford striking illustrations of the length to which courts of Equity have gone in order, by extending their jurisdiction to parties having a several ownership of the property affected, to afford redress or preventive relief against an evil operative on, or threatening all alike.

Ch. Walworth in Murray v. Hay 1, Barb. *supra.*

Upon a demurrer for multifariousness interposed to a bill filed in the Court of Exchequer by seventy-two underwriters, who had been sued at law for their respective subscription upon as many different policies of insurance, to establish a defence common to them all, it was held that the complainants were properly joined, wherefore the demurrer was overruled.

Kensington vs. White, 3 Price 164.

This was followed by Ld. Abinger in Mills et al., vs. Campbell, 2 Y. & C. Ex. R. 389.

To an information and bill, in which ten persons were relators and plaintiffs on behalf of themselves and all the tenants and occupants of houses and other premises situated in Great Britain, in the county of Lancaster; subject to the rates and assessments and entitled to the benefit of the acts of Parliament thereinafter mentioned, a demurrer for misjoinder was interposed. The Vice Chancellor in overruling it remarked: "The object of the bill is to avoid the payment of the assessments in question, and every individual assessed has in that respect one common interest." Attorney Gen'l. vs. Heelis, 2 Sim. & Stu. 67, 76.

Complainants were several proprietors of different lands and mills and of separate parts of the natural water course at the outlet of a lake. The nuisance sought to be restrained was an artificial channel cut by defendant to draw off the water of the lake and thereby prevent its flowing by its natural channels to the several mills of complainants respectively. The chancellor (Sanford) decided that as the acts of the defendants were a common injury to all the complainants there was such a common interest in the subject of the suit as to authorize them to join in one bill, although the injury which each sustained by the diversion of the water from his individual mill was separate and distinct. Reed et al. vs. Gifford, Hopk. R. 416.

The avoidance of a multiplicity of suits is ever a favorite

object with courts of equity. Notwithstanding the general policy which influenced this court to withhold its interposition at the suit of Dows against the City of Chicago, (11 Wall. 109) it did not hesitate to intimate that its action might have been different had the original bill exhibited the same ground for avoiding a multiplicity of suits as did the cross-bill of the Union National Bank of Chicago filed in the same suit.

While it is true that the appellants are the several owners of separate parcels of land fronting upon the line of the improvement in question, it is not less true that they have a common interest centering in the point at issue, to wit: the resistance of a uniformly assessed and uniformly burdensome illegal tax. The rate $8,71.41 per front foot, is uniform throughout the street; the oppression bears upon, the injury is common to all alike. The case is to be distinguished from such of the New York cases as apply to the attempt of taxpayers to avoid illegal corporate acts the principle applicable to public nuisances. The cases themselves show that the analogy is intended to apply to instances of general public misfeasance when, although the injury is common to all citizens in their corporate capacity, it is nevertheless incapable of being apportioned among each individually. The misapplication of corporate funds, while injurious to the municipality and its taxpayers generally cannot be said to bear oppressively upon any one individual or set of individuals more than others. It is the particular bearing of the injury, then, which, even in New York, it is believed, would sustain a suit by taxpayers on behalf of themselves and other taxpayers similarly affected against the municipal government or its agents.

In the course of an able opinion in De Baum vs. the Mayor, &c., of New York, 16 Barb. Roosevelt, J. says:

An objection, stated in the opinion of the court below, that if this suit by two, out of a great number of taxpayers can be sustained, then every other taxpayer may bring a

like suit, and thus engender "an overwhelming mass of litigation," is founded, I conceive, in misapprehension. The present suit is not brought by the two plaintiffs on their own behalf, but "on behalf of all the taxpayers in the city." No other independent suit, therefore, would be necessary or be permitted; and should another be instituted, all proceedings in it, according to the established rule, would be stayed."

This was in affirmance of the doctrine that the tax-payers may, for themselves and all other tax-payers, unite in a proceeding in equity to enjoin the corporation, previously established in

Adriance v. The Mayor, etc., of New York, 1, Barb. 19.

Christopher, v. The Mayor, etc., of New York, 13, Id. 567.

Shilhan, v., Sharp, 15, Id. 193.

In Barr vs. Dennison, 19 N. H. 170, it was held, in considering a bill filed by seventeen tax-payers on behalf of themselves and others, that

"The preventive interposition of equity has been applied to like cases, and it has been held that when the inhabitants of a town or parish were threatened with an illegal tax, one or more suing in behalf of all, may maintain a suit to restrain the collection of it."

Baltimore vs. Gill, 31, Md. 375.

Vnover vs. Justices, &c., 27, Geo. 354.

To a similar effect is the lately decided case of Colburn et. al. v. Mayor of Chattanooga, reported in the March (1878) number of the American Law Register, p. 191.

A joint bill by two or more parties, setting out distinct grounds on which each sought relief, would be dismissed as multifarious. But when the illegality extends to the whole assessment or when it affects, in the same manner, a number of persons, so that the question involved can be presented without confusion by one bill filed for all, or any number of those thus affected, there seems to be no sufficient

reason why a joint bill should not be permitted. The reasons favoring it are, that it avoids the necessity of a multiplicity of suits, and the attendant trouble and expense; and the objection that the interests of complainants are severed, is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue; whereas, if the parties did not join, the same issue must be passed upon in separate suits, bought by the several complainants.

Cooley on Taxation, pp. 545—6 and authorities cited.

Schofield vs. City of Lansing, 17, Mich. 437.

The assessment, levied upon a uniform scale of $8.74 41-100 per foot frontage, was co-extensive with the limits of Seventh street, southwest. Its operation, therefore, was uniform upon every owner of property on the lines of that street. The property owners shared alike the benefit of the improvement, and they were no less the victims, in common, of whatever fraud, illegality, or injustice was inherent in the assessment. In seeking relief against the latter, can it be claimed for a moment that they have other than a common interest?

II.

In this country the right of property holders, or taxable inhabitants, to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties in any mode which will injuriously affect the tax-payers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property has been affirmed or recognized in numerous cases in many of the States. It is the prevailing doctrine on the subject.

2 Dillon, Mun. Corp., Sec. 731.

Blackwell Tax T, pp. 553, et Seq.

The peculiar appropriateness of equitable relief becomes the more apparent when enquiry is made into the nature of the functions exercised by the Board of Public Works in respect of this improvement.

The general sphere of duties pertaining to that body has been clearly defined by this court in Barnes *vs.* The District of Columbia. 92, U. S. 545.

If, in the conduct of the work, originated, as we have seen, and judicially acted upon by the proper authorities of the late corporation of the City of Washington, the Board of Public Works, succeeding to the places of the former superintendents, acted solely as ministerial agents, the writ of certiorari certainly was inapplicable.

Certiorari lies, at common law, only to inferior *courts* and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* in its nature.

Bacon's Abr. Certiorari, B.

Fitzhubert Nat. Brev. 245 A.

Com. Dig. Certiorari, A.

1 Wm. Bl. 233.

People vs. Mayor etc., of New York, 2 Hill, 9.

In Matter Mt. Morris, Sq. Ibid. 21.

The purely common law office of the writ is unaffected by statute in the District of Columbia.

What, then, was the nature of the duties discharged by the Board of Public Works in respect of the conduct of the Seventh street improvement? If those duties were judicial, in the absence of other equities in the complainants, certiorari might lie; if ministerial, no other forum than that of equity was open to the complainants. Nor will it do to argue, from the nature of the powers conferred upon the board by the organic act, that its functions in respect of the subjects of its exclusive control, to wit: the streets, avenues, alleys, and sewers of the city were essentially judicial, for *non constat*, but that—

"Duties which are purely ministerial in their nature, are sometimes cast upon officers whose chief functions are judicial. When this occurs, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct."

Shill vs. City of Brooklyn, 5, Am. L. R. N. S. 39.

Conceding, a. g., that the Board of Public Works, as to matters originated by them in the discharge of their official duties, was clothed with jurisdiction, i. e. the prerogative to hear and to determine; it will, nevertheless, admit of no denial, that, when called upon merely to superintend the completion of that which had been projected under the judicial sanction of another body, the Board of Public Works exercised no other than ministerial functions. Ex. gr., the improvement of Seventh street was prescribed, as we have seen in and by the several ordinances of the Mayor, the Board of Alderman and Board of Common Council of the city of Washington. These ordinances not only determined the nature of the improvement to be made, its extent and the manner of its construction, but, likewise, the particular ministerial officers, who should superintend its conduct; "said sewers to be built under the direction of the superintendent of sewers, carriage-ways, etc., superintendence of the commissioner of the Seventh Ward, and two assistant commissioners to be appointed by the Mayor;" and as to the carriage-way that "the work be executed under the superintendence provided by law." (Record p. 8.) The passage of these ordinances and the execution of the contract of March 30th, 1871, exhausted the exercise of judicial functions in respect of this work. On its being turned over to the Board of Public Works, nothing remained for that body to do but to superintend the completion of the work, in accordance with the terms of the contract. They succeeded to the duties, no more and no less, of the superintendents named in the ordinances. Theirs was a position of trust, the obligations of

which they violated, in a manner the most flagrant, at the instant they undertook in the summary manner already indicated, to alter the construction of the sewer. For this breach of trust they are amenable to a court of equity, and, in the nature of things, could not have been made accountable by writ of certiorari.

"An ordinance of a city corporation directing the construction of a work within the general scope of its powers is a judicial act; *but the prosecution of the work is ministerial.*"

Kavanangh *vs.* Brooklyn, 38, Barb. 232.

If certiorari was not applicable, it will hardly be contended that any other form of purely legal remedy was. Appeal was never provided, prohibition and indictment were manifestly inappropriate, and any form of civil *action* must have proven wholly ineffective.

Assuming a. g., the writ of certiorari to have been applied for, what must have been the return made by the Board of Public Works? Starting with its arbitrary assumption of authority, on the 3rd day of July, 1871, it would have exhibited, most probably, its so called contract with Linville, the amount of work done, its cost, and the assessment imposed. On its face a sufficiently valid return, and one behind which, in view of the common law office of the writ in the District, it would have been impossible for the plaintiff to go. The extraneous facts relating to the inception of and the source of authority for the work, its peculiar course, character, composition, and the limitation upon its cost, the contract of March 30th, 1871, *the absence of any other contract*, the specific items of overcharge, reckless mismanagement and constructive, if not actual, fraud, must, of necessity, have been excluded. The existence of these extraneous facts and the necessity of proving them in order to invalidate the exhibit made by the Board of Public Works, brings the case within another of the well known exceptions to the general rule of equity exclusion enunciated in the case of Heywood *v.* Buffalo. 4 Kernan 537.

So much then for the case as it was presented upon the the original pleadings. The bill, in its nature *quia timet*, appealed confidently to the jurisdiction of equity, first, because it sought substantial relief against the acts committed and threatened by certain officers of the municipality who, *pro hac vice*, at least, acting as ministerial agents, have been guilty of a flagrant breach of corporate trust, second, because the existence of extraneous facts while they must be fatal to the action of those agents in a court of equity would be wholly inoperative in the presence of a return, valid upon its face, to a writ of certiorari, and third, because relief to all the complainants, who, although unconnected, are interested alike in resisting an assessment uniformly levied and as uniformly oppressive, would thus be secured in one suit and a multiplicity of actions be, thereby, avoided.

In view, however, of the supplemental proceedings referred to and the presence of the First National Bank, whereby the suit has been transferred into a controversy between taxpayers seeking to preserve their property rights from threatened destruction, on the one hand, and a speculative private corporation, on the other, the claim of these complainants to the jurisdiction and good offices of a court of equity is free of all possible doubt.

Those considerations of policy which have made this and other tribunals disinclined to interfere, by equitable process, with the collection of State revenue, are absent from this and cause 531. In both cases the First National Bank of New York, *pendente lite* and with full knowledge of their doubtful validity, became the purchaser of the certificates of indebtedness representing the assessments. All the revenue derivable from these sources has been collected by the municipal government. The contest therefore resolves itself into a struggle between the oppressed taxpayer, seeking to avert the unjust confiscation of his

lands, and as peculative corporation which strives to reap the undeserved fruit of a desperate venture.

By act of the Legislative Assembly approved August 10, 1871, the assessment and certificate of indebtedness are declared to be a lien upon the property against which the latter is issued. In the hands of a third person it is attended with the most oppressive incidents of a deed of trust. At the instance of the holder (the cestuique trust) the Board of Public Works or their successors, the Commissioners, (the trustees), are required to expose the property against which it is issued to public sale in satisfaction of the amount borne upon its face with interest at the rate of ten per cent. per annum. The deed thereupon to be delivered to the purchaser is declared by the same ordinance to import "a good and perfect title to the property."

The effect of these successive steps in the involuntary alienation of the taxpayer's land can be no other than to cast upon the title thereto such a cloud as equity alone can affectively relieve against. This point is more fully discussed in the appellee's brief in cause No. 531, to which reference is here respectfully made:

Blackwell Tax Titles, 557–564.

III.

The answer of the Board of Public Works being full and to every part of the bill must, in deference to well established principles of equity practice, be held to overrule the demurrers.

Story's Eq. Pl., Sec. 688.

IV.

The fourth and succeeding assignments of error regard the merits of the cause. Assuming the court below to have erred in deciding the jurisdictional questions raised by the

demurrers, it is confidently submitted that relief should ensue to the appellants:

(*a.*) Because the work which furnished foundation for the obnoxious assessment was not done pursuant to the ordinances which authorized, or the contract which prescribed it.

(*b.*) Because the improvement, as made, was not sanctioned by antecedent legislative appropriation, nor limited by the terms of a previously executed contract in writing.

(*c.*) Because said work, as appears by a preponderance of affidavits, was carlessly, recklessly and improvidently executed, and at a cost the extravagance of which betrayed the grossest violation of corporate trust.

(*d.*) Because the assessment was made upon a basis not prescribed by law, but arbitrarily established by the Board of Public Works in defiance of the plain requirement of the 37th section of the constituent act, before recited.

In estimating the extent to which limitations upon corporate powers have been infringed in the conduct of the improvement it is well to bear in mind that the latter was projected under a form of municipal government more immediately informed by the sentiments and wishes of the taxpaying inhabitants, and more directly dependent upon their suffrages, than was the one under whose administration it was illegally modified and completed This is exhibited in the very process of framing the ordinances which authorized the work. Deriving their inspiration from the petition of citizens whose property the improvement would immediately benefit, their provisions were conformed, as nearly as consisted with the public good, to local requirements, and the financial abilities of those upon whom the expense of constructing the projected improvement must fall. Is it a matter for surprise, therefore, that those who

had apportioned the cost of what was to be done relatively to their ability to pay should have viewed with indignant alarm the entire subversion of their reasonable and carefully elaborated plans, and the reckless accumulation of a debt the one-third whereof more than equalled the entire estimated cost of the originally divised work? It has been made already sufficiently evident, in the statement, that the order of the Board of Public Works of July 3, 1871, which was signed by its chief engineer, assumed to modify the dimensions and other essential features of the sewer without the existence of an antecedent contract or the prior allowance, by the legislature, of an appropriation.

This was directly violative of the 37th section of the organic act.

The particulars wherein the cost of the improvement was recklessly extravagant and which have made it suggestive, at least, of constructive fraud are given in the original and amended bills of complaint. (Record pp. 4 and 40.) The affidavits, which were filed in aid of the motion for a preliminary injunction, exhibit, with sufficient clearness, the imperfect character of the workmanship done and the material furnished.

The Legislative Assemby having been entrusted with authority to ascertain and determine the *manner* in which "property adjoining and to be specially benefitted by the improvements authorized by it, and made by the Board of Public Works" should "be assessed a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost" it was incompetent for that body to delegate to others the exercise of that sovereign power.

Whether the assessment shall be upon all property found to be benefitted, or alone upon the abutters, according to frontage or according to the area of their lots, is *in all cases* a question of *legislative expediency* unless there be some special restraining constitutional provision upon the subject.

Dillon Mun. Corp. §596–618.

The failure to exercise such discretionary power, or the attempt to delegate it, is equally fatal to the validity of the assessment.

Id. 60.

Hydes vs. Joyes, 4 Barb. (Ky.) 464.

Culbertson vs. City of Cincinnati, 16 Ohio, 514.

Cooley Con. L. 205.

A review of the legislation of the late municipal government fails to disclose any provision whatever, for establishing the basis of property assessment for special improvements. The sole rule upon which assessments were made, was prescribed, arbitrarily, by the Board of Public Works, and was, in all respect, an unconstitutional assumption, by that body, of a purely legislative function.

Cooley Cons. L. 505-6-7, 517.

It is respectfully submitted that the decree of the Supreme Court of the District of Columbia, dismissing the bill of complaint, should be reversed.

LAMBERT & DARLINGTON,
R. T. MERRICK,
Solicitors and of Counsel for Appellants.

IN THE

Supreme Court of the United States.

MATTINGLY ET AL. *vs.* THE DISTRICT OF COLUMBIA ET AL.	No. 62. Equity.
THE FIRST NATIONAL BANK OF NEW YORK ET AL. *vs.* SHOEMAKER.	No. 531. Equity.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

STIPULATION.

On leave of the court first granted, it is hereby stipulated by counsel, representing all parties in the above-entitled cases, that said No. 531 be and the same is advanced, and shall be heard with No. 62, as one case.

A. G. RIDDLE,
Attorney D. C.
T. A. LAMBERT,
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WILLIAM A. COOK,
Solicitor First National Bank, N. Y.

BRIEF FOR THE COMMISSIONERS OF THE DISTRICT.

THE CASES.

By stipulation, they are to be heard as one case. They stand on bills, answers, and exhibits. For convenience, they may be called the Mattingly and Shoemaker cases.

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THE CASES.

By stipulation, they are to be heard as one case. They stand on bills, answers, and exhibits. For convenience, they may be called the Mattingly and Shoemaker cases.

The first seeks to enjoin the collection of the special tax assessed for the improvement of Seventh street west, from B street south to the river.

The Ultimate Facts.

1. The plaintiffs, in severalty, own the real estate described in the bill, which abuts on Seventh street west, along the line of the improvement.

2. The corporation of Washington, under the ordinances set out in the record, contracted with the defendant (Linville) to construct a sewer and pave said street from Virginia avenue to the river.

3. The Board of Public works succeeded the corporation, took possession of said work, continued Linville, changed the sewerage, and contracted with Gleason, the defendant, for the pavement of the sidewalks and setting the curbstones.

4. As this case stands, this work must all be taken to have been completed and well done.

5. One third of the whole cost was assessed on the adjoining property per foot front, without reference to the value of the property or to the cost of the work and material in front of each lot or piece of property. Notices of the assessments were given, and tax not paid.

6. In making these assessments, school houses and churches were exempted.

7. In the sum total of cost, an estimate was made for superintending the work. Engineering, clerk hire and office expenses were included.

[NOTE.—The answers which set these items forth are responsive to the bill, and they must be taken as items of cost for the basis of an assessment.]

8. The plaintiffs plead *puis darrein continuance*, a tender of what they admitted to be due, and paid the money into court under the District act of May 29, 1873.

The Shoemaker Case

Seeks to enjoin the collection of a tax assessed on real estate, fronting on the Seventh street road, as it is called, from Boundary street to the District line.

The Ultimate Facts.

1. Shoemaker owns the land described in the bill, fronting on the road, adjoining the improvement.

2. The improvements were made by the Board of Public Works.

3. The appropriation for the work was $25,000. The road being embraced in the general plan of improvements, projected by the Board.

4. The cost of the work was $174,268.44; of this, one third, amounting to $46,918.42, was assessed on the adjoining property per foot front, as in the Mattingly case. $33,515.15 was assessed against the United States.

5. It does not appear that there were school houses and churches on the line of this improvement. If there were, they were treated as exempt.

6. Notice of the assessment was given, payment withheld, and certificates of indebtedness issued and sold to defendant Bank.

7. The mode of collecting the tax in both cases was (if not paid in one year) to sell by the Board so much of the property as was needed, on a daily advertisement of three weeks, and deed by the Governor of the District to purchaser.

Questions.

On these facts, the following questions arise under the law:

I.

Was this mode of assessing one third of the whole cost upon the abutting property per foot front, without reference to the value of the property, or its special benefit, and without reference to the cost of the improvement in the immediate

front of the lot charged, and the proposed mode of collecting the assessment, authorized by law?

The eleventh paragraph of the Shoemaker bill denies this. (Rec., pp. 5 and 6.)

The eleventh paragraph of the Mattingly amended bill alleges that each lot should be charged with the cost of the improvement in its immediate front. (Rec., p. 41.)

This proposition also includes the validity of the certificates of indebtedness, and might be divided into three questions: the mode of assessment, the mode of enforcing collection, and the validity of the certificates; but it will be found that the first is really the only one of gravity; and that the statutes, which will be brought to the notice of the court in its discussion, will incidentally dispose of the other two. If it shall be found that the assessments were made by authority of law, the mode of collecting and the certificates authorized by the same legislation stand of course. If that was invalid, these can be of no importance.

Propositions subordinate and in support of the above.

I will maintain—

First. That Congress, in express terms, has directly approved the legislation under which these assessments were made.

Second. It has recognized and approved the improvements and assessments themselves, as valid.

Third. Indirectly, as the supervising responsible power, with full knowledge, it has silently acquiesced in and approved the action of the Board of Public Works in the premises.

II.

Was school and church property exempt by law from these special assessments?

III.

I contend that in the Mattingly case, the supplemental bill—in effect a plea *puis darrein continuance*—the plain-

tiffs then in court, the tender and payment into court,—are an admission that the plaintiffs have no ground for relief, and they are estopped from further insisting upon the illegality of the assessments.

The plaintiffs in that case raise some minor questions:

(*a*) They deny that the Board of Public Works could change the character of the work.

(*b*) That it could improve the sidewalk and set the curbstones.

IV.

Can Shoemaker be holden for more than his proportion of the original appropriation for the improvement of the Seventh-street road, or was the action of the Board of Public Works in the premises invalid, in whole or in part?

(*a*) It is claimed that the Board of Public Works could make no valid contract for work in excess of the ~~improvement.~~ appropriation

(*b*) It will be contended by me that this action was valid, and was ratified by Congress.

V.

Are not the parties on the other side concluded by their silent acquiescence in the action of the Board during the progress of the work, and what are their remedies?

[NOTE.—I seek to make no minor technical questions, and ask an adjudication of the merits of this controversy only.]

ASSIGNMENT OF ERRORS.

In the Mattingly case the court sustained the assessments.

The other side assign this for error.

In the Shoemaker case, it held that the assessment was without authority of law.

I assign this for error.

There is now due of unpaid similar assessments $1,500,000

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THE IMPORTANCE OF THESE CASES.

Of more than a score of cases, these are the first that have reached this court. Their importance to the District and its people cannot be overestimated.

The question—the legality of these assessments—lies at the foundation of all the improvements made within the six last years, upon which rests a large share of the indebtedness of the District, estimated at $20,000,000.

There is now due of unpaid similar assessments $1,500,000

or $2,000,000, depending mainly on the solution of that question, and nearly all the other cases growing out of this special taxation will be decided by the adjudication of that proposition and the other points involved in these cases; and when it is remembered that there is a statute of the District Legislature, under which property owners who have paid taxes illegally assessed, may make reclamation, and how facile courts have been to adjudge repayment, the gravity of these cases may be appreciated.

The Argument.

The 37th section of the act of Congress of February 21, 1871, creates and defines the powers of the Board of Public Works of the District, to which frequent references must be made.

16 Stats., 426.

See Appendix A of this brief, p. 29.

This act, called the organic act of the District Government, took effect on the first day of the ensuing June. The members of the Board of Public Works received certificates of their appointment early in March, and an act of Congress of April 20 provided that they should constitute a Board for all purposes upon their appointment and qualification. (17 Stats., p. 7.)

A provision of the organic act continued the ordinances of the corporations in force, until repealed, and the charters expired on the first day of June following. Under these provisions the ordinances for special improvements might remain in force until the works authorized by them were completed.

It would seem that the passage of the act stimulated the corporation of Washington to great activity in the field of improvements. It passed numerous special ordinances for many extensive enterprises, made contracts, and the contractors entered upon their execution with vigor.

Under the authority of the act of April 20, the new Board asserted its power, resorted to the courts, and by injunction

stopped the work on some of the streets, and resumed it themselves, while on others they secured the control by arrangement with the contractors, as in the case of 7th street.

It will be seen that the third paragraph of the 37th section places all the streets, avenues, alleys, and sewers, in the hands of the Board. Their authority in the premises is admitted in the supplemental bill in the Mattingly case.

The ordinances of the District, (Rec., pp. 8 and 9,) like all the ordinances of the two corporations, charge the whole cost of improvements on the abutting property.

The 37th section of the organic act permitted the Board to assess on such property for improvements, "made by them," one third of the cost only.

An act of the District Legislature, December 19, 1871, (L. D. C., 3d part, p. 11,) required that for all improvements made in the District after the passage of the organic act, the adjoining property should be assessed as provided for in said 37th section.

Congress, by the act of April 20, 1871, declared that the then pending improvements on M street and these improvements on Seventh street, should be assessed on the adjoining property in the manner prescribed by that section. (17 Stats, p. 10, sec. 17.)

This sketch conducts to the main proposition, and incidentally disposes of one or two of the minor questions in the Mattingly case, as will be seen.

I.

Was there authority of law for assessing one third of the whole costs of those improvements on the property of the parties in those cases, abutting on them, per foot front?

The eleventh paragraph of the bill in the Shoemaker case claims that the act of August 10th (Appendix B) fails alike in prescribing what amount, within the one third, should be charged upon the property, as well as by what principle or rule it should be assessed, and alleges that it was done, in these respects, arbitrarily, without law. Upon a

recurrence to the 4th paragraph of the thirty-seventh section, it will be seen that the *manner* of the assessment, and not the *amount* to be assessed, was to be prescribed. The Legislature was at liberty to leave the amount, within the limit of one third, to the discretion of the Board, as was judicious.

In Washington and Georgetown, as will be seen, the old rule was, to charge the whole cost on the property; and, doubtless, a uniform rule of one third, without an attempt to discriminate nice questions of the difference of benefits, was the only safe rule, under the act.

The eleventh paragraph of the Mattingly bill complains that one third of the whole cost was assessed upon the whole front, instead of assessing upon each lot the cost expended in its immediate front, which presents one phase of the same paramount question.

As bearing upon both aspects, I adopt the luminous language of Mr. Cooley, a writer not surpassed in breadth and accuracy of view, in discrimination, or the perspicuity with which he sets forth his ideas:

ASSESSMENTS BY THE FOOT FRONT.

Assessment of the cost on the whole frontage.—Cooley on Taxation, pages 451, 452.

In many instances, where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the Legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits, and making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value could be, and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment.

Occasional hardships must inevitably result from the adoption of such a basis, but the question is fairly a debatable one, whether they are likely to be more serious or more frequent than those which are to be anticipated from the selection of some other rule; and this question must be deemed settled by the statute.

Assessment of the cost in the immediate front on each lot.—Cooley on Taxation, pages 453, 454.

In some instances a somewhat different method has been adopted for levying the cost of local works. Instead of establishing a taxing district, and apportioning the cost throughout it by some standard of benefit, actual or presumptive, the case of each individual lot fronting on the improvement has been taken by itself, and that lot has been assessed with the cost of the improvement along its front, or perhaps with one half the cost, leaving the opposite lot to be assessed for the other half. If such a regulation constitutes the apportionment of a tax, it must be supported when properly ordered by or under the authority of the Legislature. But it has been denied on what seem the most conclusive grounds that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing district whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a State officer chanced to be chosen should pay his salary, or that that location in which the standing army, or any portion of it, should be for the time being, should be charged with its support. If one is legitimate taxation, the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and it is not supported on the taxing power exclusively; as has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible Government.

The Board of Public Works "shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be especially benefited by the improvements authorized by law, and made by them, a reasonable proportion of the cost of the improvement, not exceeding one third of such cost which sum shall be collected as all other taxes are collected." (Appendix A, par. 4, p. 29.)

Acting upon the more obvious meaning of this language, the District Legislature prescribed the method of this assessment by the first section of the act of August 10, 1871, which provides that the whole cost of a given improvement shall be summed up and filed in the office of the Board, and immediately thereafter an assessment, based on said statement, shall be made, as provided for in said section, (the thirty-seventh,) of said act, "which assessment shall be collected by the said Board, in the same manner as other taxes of the District of Columbia are now or hereafter may be authorized to be collected." (Appendix B, which gives the act entire, p. 31.) For the method of such collection, see Appendix B*a*, p. 32.

This is the sole method prescribed by the District Legislature, or by Congress, for giving effect to this provision of the thirty-seventh section of the act of February, 1871. That declares that a portion not excluding one third of the cost, shall be assessed on the adjoining property, in such manner as shall be prescribed. The prescribing act casts it back, and says that it shall be done as prescribed by that same thirty-seventh section, a declaration that after the cost is ascertained, that section itself points out the manner with sufficient certainty.

That was also the judgment of Congress, for, in the Deficiency act of April 20, 1871, quoted above, it provides that the costs of the improvements on M street, and this same work on 7th street, shall be assessed "as provided in the act of February 21, 1877." Not as shall thereafter be prescribed by law, made to give effect to that section, but as itself prescribes. (See 17 Stats., sec. 17, p. 10.)

With these two legislative declarations of the scope of the language of that section, let us examine it.

With the equity or expediency of the provision under consideration, we have nothing to do. Does it, with sufficient certainty, indicate the means of executing its own provision in this respect; and has that been followed? "Upon the property adjoining and to be especially benefited by the improvements," is the language. This means the

property abutting on or joined to the improvement—all the property so situate; for, presumably, all that lies along both sides of the improvement will be specially benefited by it, at least one third more, it may be, than the property of the city or county generally, upon which, with itself, the burden of the residue falls.

How much, within this limit of the one third, abutting property shall bear, is for the Board to determine.

So much is clear.

I think it equally clear that this governing idea of contiguity, in connection with an immediate and special benefit by reason of it, parallel with, running unbrokenly along the line of the improvement, suggest the one thought, and excludes all others, that this assessment is to be a continuous lineal burden, equal upon the entire frontage, the cost of which, per foot, is to be ascertained by a division of the whole cost, by the whole number of feet front.

I think this language excludes the idea of assessing it upon the property according to valuation, which is the correct one in adjusting the general burdens of Governments, while that of contiguity, for special benefit, requires that it should be laid by frontage. So obvious was this that no thought that it could be questioned occurred to the District Legislature, and no question of it was ever raised, but by the laborious ingenuity of counsel exhausted upon it.

The argument does not rest here. It has scarcely begun.

On recurrence to the language of that thirty-seventh section, it is seen that while it apparently contemplates a manner to be prescribed in the future, it is equally consistent with a manner already in existence, either by positive law, or well known custom, a matter well known to the subjects of the statute. Every law is addressed to a people with reference to their surroundings, experience, and habits. It silently takes notice of existing law, customs, and methods, and is to be construed and enforced with reference to them.

We are not left to any uncertain construction of this language. The uniform legislation of Congress on this precise

point, and the subordinate action of the two municipal corporations, preclude the necessity of construction.

Georgetown presents the first instance. That city derived its charter from Maryland, which is silent on this proposition. The charter was amended by Congress, May 2, 1802, by an act which specifically authorizes it to improve streets, lanes, alleys, dig wells, &c., and assess the cost on adjoining property, not exceeding $2 per foot front. Amended March 3, 1805. (Appendix C, p. 33.)

These laws of Congress furnished the authority which governed all the subsequent action of that corporation; numerous instances of which I am prepared to cite.

Washington city was incorporated 1802; charter amended May 4, 1812. The eighth section of the amending act authorizes the town to improve the streets, "at an expense not exceeding $2.50 per foot front of the lots fronting on each improved street, and charge the same to the owners of the lots fronting on said street or part of street in due proportion." (Appendix D, p. 34.)

This provision was repeated, with amplification in the amendment of the charter of May 15, 1820, the eighth and tenth sections. (Appendix E, p. 34.)

May 17, 1848, the amended charter, with those provisions, was extended for twenty years. (9 Stats., p. 223.)

It was further amended, and these provisions preserved with care, May 5, 1864. (Appendix F, p. 35.)

See also act of February 23, 1864. (13 Stats., 434.)

The charter thus amended was continued until the further action of Congress, May 28, 1868, (15 Stats., 61,) and remained the law until the first day of June, 1871, repealed by the organic law of the District. (See act of April 6, 1870, repeating the power and method, 16 Stats., 82.)

It is thus seen that at the time of the passage of the organic act of the District, the charter of the cities of Washington and Georgetown expressly authorized this method, and no other, of assessing the costs of special improvements, and, so far as the cities were concerned, the manner of assessment was prescribed.

Congress has, in another significant way, itself prescribed this manner of assessing the cost of special improvements on the adjoining property. Within the last few years it twice paved Pennsylvania avenue, and each time it assessed a portion of the cost on the owners of the adjoining property, per foot front.

Act of July 8, 1870, sec. 3, 16 Stats., p. 196.
Act of July 19, 1876, 19 Stats., p. 92.

ORDINANCES OF WASHINGTON.

The first ordinance of the city of Washington, under the charter of 1812, was approved April 16, 1814, for the pavement of Pennsylvania avenue, between Sixth and Seventh streets, which levied a tax of $2.50 per foot front, to pay for the same. (Appendix G, p. 36.)

Similar ordinances were enacted, as follows:

One June 27 and one August 6, 1814.
Two of July 1, 1815.
Two of July 12, 1815.
Two of July 20, 1815.
One September 21, 1815.
One November 11, 1815.
One May 10, 1816.
Two March 15, 1817.

And all the ordinances from that day to the present, including the two, part of Exhibit 3, in the record of the Mattingly case, are on this basis.

I think this was not the rule of the Levy Court. Its roads were few, and generally mean.

It is thus seen that from the beginning of congressional government to the last act of national legislation, paving Pennsylvania avenue, this manner of assessing the costs of improvements upon property, by its frontage, was that which it prescribed for its two subordinate corporations, and followed itself; and whether the acts prescribing it remain or not, this usage has become the one general custom which remains and will govern till Congress enacts a different

rule. Under this reign of law and custom, the thirty-seventh section of the organic act was passed, and is in complete accord with it. It is interpreted and enforced by it. The only change it effects, is in the proportion from the whole to one third of the cost.

There may not be great significance in the ordinances of the corporations. I have referred to those of Georgetown, cited several of the corporation of Washington, and the courts of the District notice them. The fortieth section of the organic law continues all laws and ordinances of those corporations in force, until repealed by Congress or the District Legislature. (Section 91, Revised Stats. D. C.) I think this brings them to the notice of the courts without pleading or proof.

It is confidently submitted, that the assessment of one third of the cost of the improvements on Seventh street and on the Seventh-street road, mentioned in these records, upon the adjoining property, according to frontage, was fully authorized by law.

It may here be observed as to the residue of this proposition. The thirty-seventh section requires that these assessments shall be collected as all other taxes shall be collected. It is silent as to the *person*, but names the *mode*. The act of the District, of August 10, 1871, authorizes the Board to make these collections, as it well might. The organic law confers power on the Board to disburse the proceeds, and it undoubtedly contemplated that they should also collect the assessments. The act of August 10 gives effect to that obvious intention. For mode of collecting other taxes on real estate, see Appendix B*a*, p. 32.

First. In further support of this conclusion, I claim that this manner of assessing in amount and method by frontage, and collecting the cost of these improvements, was approved by the subsequent legislation of Congress.

(*a*) By recurrence to Appendix B, it will be seen that the third section provides for the issuance of certificates of indebtedness, if a special assessment remains unpaid thirty days after notice; and if the assessment shall not be paid

within one year, the Board, upon application of the holder of the certificate, shall sell the property on which it is assessed on advertisement "*daily, for three successive weeks.*"

On the 3d of March, 1875, a year after the Board had ceased to be, Congress, describing this act by its title, proceeds to amend the third section "so that sales under said law shall be advertised *twice a week* for three successive weeks, instead as heretofore required." (Appendix G, p. 36.)

This was repeated in effect in the 15th section of the act of July 12, 1876. (19 Stats., p. 87.)

The above act of August 10, 1871, (Appendix B,) it will be remembered, is that which prescribes the manner of assessing one third of the cost of improvements on the adjoining property under which, in connection with the oft-quoted 37th section of the act of February 21, 1871, all the special assessments were made. Congress thus, in clear, positive terms, finds the manner amply prescribed for making them, directly approves the assessments made pursuant to it, and gives them effect. This whole matter repeatedly passed the review of Congress long after this act of August 10th was enacted and had been executed an hundred times, and after that execution and the assessments were put in issue and contested in the courts, and when it must have had full knowledge of the whole subject matter; and it thus sanctions the law, approves the construction it received, and effectuates its execution, not only the manner of making the assessments and their amount, but the mode of their collection.

(*b*) The act of August 10, 1871, was amended by an act of the District Legislature, of May 29, 1873.

This authorized the payment of special assessments in the certificates of indebtedness issued by the Board of Public Works. To pay these, all the special assessments were to be placed in the hands of the Commissioners of the Sinking Fund of the District—a body specially charged with the payment of the debts of the District—by various acts of the Assembly, and recognized by Congress.

It also provided for the payment of all special assessments in five annual installments. If the certificates were not paid in one year, the Sinking Fund Commissioners were required to buy them in, on demand of the holders. (Appendix H, p. 37.)

These acts thus became one law, and a recognition of any part of it, unaccompanied with disapproval of the residue, is a ratification of the whole.

It will be remembered that the third section of the act of August 10th, authorized the Board of Public Works to issue and sell certificates of indebtedness against property where a special assessment remained unpaid.

The first section of the act of May 29 authorized the Board to issue certificates of indebtedness against the District for work done, which were made receivable for special assessments.

The fourth section authorized the Commissioners of the Sinking Fund to buy in outstanding assessment certificates as above stated, and to enable them to do it, the Board might issue further certificates of indebtedness, if needed, similar to those authorized by the first section.

The second, fourth, and eighth sections of the act of June 20, 1874, providing "for the Government of the District of Columbia," refer directly to these provisions of the above-named acts. The second section forbids the Commissioners of the District to anticipate the revenues, by sale or hypothecation of the taxes, which refers to the third section of the act of August 10th, and it approves of the provision of the second section of the act of May 29th, which requires that certificates of assessments shall be placed in the hands of the Sinking Fund Commissioners. The fourth section levies a general tax, and declares that the certificates of the Board of Public Works shall not be received in payment of them, while the eighth section prohibits the further issue of those authorized by the fourth section of the act of May 29th. (18 Stats., 116.)

Further and more emphatic is the language of the 6th section of the act, June 20, 1874, which requires *all* the contracts

of the Board of Public Works, both oral and written, to be paid, thus legalizing what may have been for any cause illegal.

I have deemed it unnecessary to cite directly and dwell upon the approval and affirmation of the improvements, and these assessments, by the acts of the District Legislature—notably, by the act of May 29, 1873—important and conclusive as this action was.

This act of June 20, 1874, spunging out of the District Government, was approved four days after the report of the joint committee of Congress which had, for months, investigated all of the doings of the Board of Public Works and of the District Government. It had the whole District legislation before it, with all the contracts, special assessments, and everything else needful to a full understanding of the scope and purpose of these acts, and for once without fiction of law, actually knew what it was about, and it thus distinctly approved and confirmed what it did not annul or amend. (See Senate Rep., 43d Congress, 2d sess., No. 453, First part.)

Second. Congress directly recognized the improvements as authorized by law, and the assessments as valid.

This is, in part, anticipated by the citation of the acts of Congress above referring to assessments, and the acts under which they were made and collected. Congress went further and paid for the work assessed to the United States.

By act of June 10, 1872, it appropriated the sum $192,620 for improving roadways, sidewalks, &c., in front of property of the United States in the District. (17 Stats., 352.)

The act of June 8, 1873, appropriated the sum of $1,241,920.92 to pay for those special improvements in front of the property of the United States. Of this $33,515.15 was for the 7th-street road. (17 Stats., 405.)

The act of March 3, 1873, appropriated $106,533 for the same purpose. And to complete the work the further sum of $913,497.26. (17 Stats., 526.)

All of these large sums were paid. Is it urged that these acts of Congress are no recognition of the special assess-

ments, nor yet of the manner of making them? They are a direct recognition and declaration of the sole judge in the premises that these improvements were "authorized by law." It is an end of that controversy. This law came directly and indirectly from Congress. That which it did not enact it approved, as we have seen. Congress knew what the law was. The work was done in its presence by agents of its own creation, and was fully reported, as is set forth in the second paragraph of the bill, p. 2, (Shoe. case,) and as the law required. It accepts the work as done under the law, and pays millions for it. To levy, assess, and collect taxes general or special is the exercise of the purely political power of which the legislature alone can judge, and its action concludes the other departments of the government. The District, so far as in its power to do so, also paid for its share of the costs of this work.

I don't look into the small reasonings of little courts to see what they say, or how they may have blundered on matters germane to this. He who asks this court to err must show better reasons for it than that other courts have erred. The ground upon which I here rest, is the broad and obvious one of the approval by the sole principal of the acts of an agent.

These improvements, then, were authorized by law. They were made by the Board of Public Works, and these two things concurring, the Board was empowered to assess one third of the cost on the adjoining property, in manner and form as it did.

Third. The relations of Congress to the District are such, that its failure to disapprove the acts of the Legislature, in whole or in part, and of their construction and execution, its silence, is to be taken as an approval.

By the express provisions of the act of February 21, 1871, Congress reserves its supervisory control of the District. It could not have parted with it. It is responsible to the people of the District and of the United States, for what it permits to take place here, in the enactment and execution

of law and government generally. It had full knowledge of the acts of the Legislature, and of the action of the Board of Public Works, which it created, and its silent acquiescence in either is to be taken as an approval. This seems to fall within the ruling of this court in Clinton *v.* Englebrecht, (13 Wall., 446.) Any other rule would be impracticable. Congress is the supervisor, and what it does not condemn or annul, it is taken to approve and ratify.

There is a good deal more than silent acquiescence by Congress in the premises. I have already called attention to the investigation of the affairs of the District, and its action under the joint resolution of February 5, 1874. I deem it useful to bring to the notice of the court the first investigation by the House Committee on the District of Columbia, under resolution of January 22, 1872, which was thorough and exhaustive. The first charge of the memorialists against the Board of Public Works before that Committee, was a violation of the 37th section of the law of February 21, 1871, in making improvements unauthorized by law. (Rep. No. 72, H. R., 2d sess. 42d Cong., p. 1.) The investigation lasted five months. The Committee had before it Appendix B, (the act of August 10, 1871,) the act appropriating $4,000,000, (App. I, p. 39,) and also the plan of the Board of Public Works for the improvement of the District found in the Shoemaker case. (Rec., pp. 8, 9, &c.) I adopt as part of my comments, the language of the Committee upon the act, (App. I,) and the plan of improvements. (Exhibit C—Shoemaker's bill.)

The Board of Public Works did make contracts for some improvements not specified in the plan presented to the Legislature, and for some of the improvements specified, they expended more than the estimate for the work. Did they therein violate the law, and was this not in pursuance of any appropriation made? It is not claimed but that the additional improvements made, which were not specified, were in entire harmony with those which were specified, and were but an extension and enlargement of the plan before the Legislature; the committee are satisfied that the Legislature did not intend to limit the authority of the Board, in making improvements, to a strict and literal following of the exact plan presented. It had been somewhat hastily prepared, and it seemed to be understoood that, to some extent, it was incomplete, and

the Legislature only intended that the plan should be the general guide as to the kind and character of the improvements to be made with the money appropriated, so that if this charge rested alone upon the appropriation made in the four-million act, it is difficult to see that it has been violated. But if this were otherwise, the $500,000 appropriation for improvements was without any restrictions whatever, and is sufficient to cover all expenditures made by the Board for improvements that are not specified in the plan of improvements which had been laid before the Legislature.

It has been urged that by this construction of the laws passed by the District Legislature, a very great, if not dangerous, latitude was given to the Board, so that they were really allowed to expend the money for improvements according to their own discretion. The appropriations were very loosely made, and it does appear that the Legislature intended to confer the power upon the Board to expend the money upon such improvements as they deemed expedient. Whether they judged wisely or not, it cannot be said that the Board violated the law in making contracts and expenditures for improvements which the Legislature had left to their judgment and discretion.

It is not necessary here to discuss or attempt to decide how limited and specific the legislative assembly may make their appropriations, and thus virtually make all improvements to depend upon their own views of their necessity and propriety; many if not all the members of the committee are satisfied they may properly restrict their appropriations much beyond what they did in the acts above quoted. It is enough for the present purpose to say that, as the appropriations were made, there was no limitation or restriction placed upon them which has been violated. In relation to this charge, it is somewhat difficult to see the occasion for asking the interposition of Congress, even if the Board had expended money for an improvement without a proper appropriation therefor by the District Legislature, when the improvement itself is a proper and beneficial one, and the legislative assembly are satisfied and make no complaint thereof. If the money were expended for an improper purpose, or corruptly misapplied, an appeal to Congress might be necessary and justifiable, as the Board are appointed under the authority of the General Government; but when nothing of this kind is claimed to exist, it would seem properly to rest with the District Legislature to complain that their appropriation had been disregarded. The committee may, as properly here as upon any of the particular charges, say, that while in all these improvements they find great cause of commendation for the energy, and liberality, and generous desire to improve and beautify the National Capital, on the part of all departments of the District Government, they also find the ordinary and usual errors attendant upon the establishment of a new system of Government. There was inexperience on the part of many; there was the lack of careful and cool legislation. In the anxiety to redeem the city from the charge of being behind, in its streets and public institutions, other cities of the country, the new authorities became somewhat intoxicated with the spirit of improvement.

Rep. 72, H. R., 2d Ses. 42d Cong., p. III.

This is much more than silent approval. It is warm commendation, and throws a clear light on the after action of Congress, when it directly approves the acts of the District Legislature, makes appropriations, and pays for the improvements of the public property, and acquiesces generally in the action of the Board of Public Works, as above cited.

This report of the committee, approving the law, plan, and Board's construction of them, was very misleading to the Board, the people, and to everybody, if, as they had a right to suppose, it was not accepted by Congress as an expression of its views and sentiments in the premises.

Here I rest the argument of this proposition.

II.

The exemption of school-houses and churches is a matter of statute law, which I quote with small comment:

"*Be it enacted, &c.*, That, from and after the passage of this act, all churches and school-houses, and all buildings, grounds, and property appurtenant thereto and used in connection therewith, in the District of Columbia, shall be exempt from any and all taxes or *assessments*, national, municipal, or county." (16 Stats., p. 153.)

I am aware that exemptions are usually construed to mean from the burden of a general tax. Assessments for special improvements rest on the ground of benefits. (Cooley on Taxation, 146, 147.)

I think the language is so comprehensive in this statute that it must be taken to exclude property from assessments for improvements.

State *v.* Newark, 36 N. J., 478.
See Oswald *v.* Gilfert, 443.
Codman *v.* Johnson, 104 Mass., 94.
Howard *v.* Boston, 104 Id., 470.

The 37th section of the act of February 21, 1871, stands with this, not repealing it.

The action of the Board of Public Works, treating the above exemption as in force, had been reported, as the Shoemaker bill sets forth; was known to Congress when it approved the special assessments, made on estimates excluding churches and school-houses, and paid by appropriation, as above set forth.

Clearly, if church and school-house property is exempt under the above act, that portion of the cost of the improvements, which otherwise would be assessed against it, remained to be distributed between the owners of adjoining property and the general fund, according to the statutory rule. It cannot all be charged to the general fund. It is one item of the cost of the improvement, one third of which adjoining property must bear.

III.

The effect of the tender and payment into court of the money tendered by the plaintiffs in the Mattingly case.

To an understanding of the matter involved in this proposition, it must be noted that the original bill was filed September 11, 1872. The act of May 29, 1873, (Appendix H,) took effect from the day of its approval. The 3d section of this act authorized the payment of special assessments in five annual instalments. Notice to pay assessments in that case bears date August 13, 1872. (Rec., p. 7.)

On the 11th day of September, 1873, the plaintiffs, under protest, tendered the first instalment of the several assessments, (Rec., p. 65,) and set the same out by supplemental bill September 13, (Rec., p. 62.)

What was the effect of this action? It must be precisely the same as would attend the tender and payment of money in any other case, under the same circumstances.

I understand the universal rule to be, that a tender is an admission, *pro tanto*, of liability, which the party is thereafter estopped from denying. Even when a plaintiff has been subsequently nonsuited, he takes the money tendered. So of payment; unless made under duress, the party cannot recover it back. And in no other instance, save the pay-

ment of taxes, does a protest rise to the dignity of duress. Why or how courts ever came to construe the demand by a tax-gatherer, or any act on his part, short of arrest, as duress, is not apparent to some minds. But admit the most stringent rule against the government ever recognized by this court—that of the chief justice in Erskin *v.* Van Arsdale, (15 Wall., 75,)—were the parties in this case in a position to avail themselves of it?

I presume the courts have assumed that when a tax collector comes with the forms of law, in his official character, and demands a tax, the subject is so overwhelmed that he is to be, for once, presumed not to know the law, or that it has any remedy for him, although it extends to him the same redress, and rather more, than it offers to him in all other cases, and he has only to express a slight dissent to enable him to recover back the amount paid as made under duress.

This was not at all the position of Mattingly and his associates. They were in a court of equity for protection from these very assessments, resisting this same demand, and had been under the protection of a preliminary injunction of the court below, (Record, p. 55,) which they afterwards dismissed themselves, (Record, p. 59,) and again had it renewed September 26, (Record, p. 66.) They had it for the asking. What pretense, under these conditions, can be made, that the plaintiffs were under the mild constructive duress of the courts in tax cases, even?

The matters thus brought to the notice of the court by the supplemental matter, on page 62 of the Record, is strictly matter arising since the last continuance, and substantially so plead, and should bring upon the plaintiffs the consequences of the plea *puis darrein continuance* at law.

1 Chitty Pl., 658, and cases cited.

Walter *v.* McConnell, 13 Peters, and any number of old cases.

IV.

A special ground is urged in the Shoemaker case, on which it is claimed that the improvements of the Seventh-street road were invalid in whole or in part. The appropriation for the entire work was $25,000, really but $20,000, as contended by the plaintiff below; while the cost was in excess of $174,000; and it is urged, that in no event can the plaintiff be holden for an assessment of more than one third of a cost of which this sum, thus charged upon the public, would be two thirds.

It is seen that this point presents matter for grave consideration.

On turning to the seventh paragraph of the 37th section Appendix A, it appears that the Board of Public Works cannot bind the District of Columbia to pay any sum of money except in pursuance of appropriation made by law, and not until an appropriation is so made. (Repeated in the 25th section of the act July 10, 1871, Appendix I.)

This language is peculiar; nor is its entire meaning at once clear. The Board cannot bind the District by contract to pay money, unless the sum has been first legally appropriated; but they can improve a street or road without a contract. I do not think that Shoemaker's case raises the question as to the legality of any contract. There is no averment that this work was done by contract. If there was, the question of its legality cannot be made in this case. Shoemaker may, as he has, raise the question whether the work was by authority of law, and is at liberty to urge that all work in excess of actual appropriation is illegal. But, because the District cannot be bound to pay money by a contract unless the money was appropriated, does it follow that a given improvement, made by the Board, is invalid? That the improvement must be authorized by law, is apparent from the fourth paragraph of the 37th section; but it is not because the District cannot be bound, save in a given way.

For a full exposition of this important point, I bring to

the notice of the court the act of the Assembly of July 10, 1871, appropriating $4,000,000. (Appendix I, p. 39.)

This is to be taken in connection with Shoemaker's Ex. C, (p. 8,) to which it refers, and by which it is to be construed.

It is thus seen that this Seventh-street road was one of the roads to be improved, and that the sum of $25,000 is appropriated for that purpose, so that there is express authority to improve it.

Let us examine this act and plan more closely, as they together constitute the law.

The first section appropriated $4,000,000, which it places in the hands of the Board of Public Works, to be expended as nearly "as may be practicable and consistent with the public interest in conformity with the plan." (Exhibit C, above referred to.)

This places the whole appropriation at the disposal of the Board at discretion, and it can no longer be said that they exceeded the appropriation for the Seventh-street road. As a material factor in the consideration of this point, I cite the act of the Legislature of August 11, 1871, (Appendix K, p. 41.)

It will be seen that this places $500,000, by express general appropriation, in the hands of the Board, to be expended, at discretion, in "the repairs of the streets, avenues, alleys, and *roads*, the construction and repairs of bridges, sewers, and other public works of the District." Here we have express authority to improve the road in question, and $25,000 appropriated for that purpose, and this is followed by this general appropriation of $500,000, to be used at the discretion of the Board, and all this in advance of any work or contract on the Seventh-street road. Concede that the construction of the seventh paragraph of the thirty-seventh section contended for by the other side is correct, and that, in cases where the District would not be bound, the improvement would be invalid for want of a previous appropriation for the whole cost, we have here the amplest appropriation.

Turn again to the views on this point from Mr. Starkweather's report, just quoted, and I invite especial attention to the following paragraph, from page IX, addressed to this Seventh-street road, and the question I am now considering:

"There was also much evidence offered in regard to the expenditure on the Seventh-street road. This road was the only one extending to the District boundary and into Maryland. At times its condition was almost impassable. The testimony is very voluminous, coming from a large number of witnesses. The committee are of opinion, on a view of all the evidence, that the improvement was needed, the work has been properly performed, and at reasonable expense."

After this investigation, in which this work occupied so large a share of time and attention, resulting in this commendation of this improvement, Congress appropriated and paid for its share of it, the sum of $33,515,15.

It is submitted that it can no longer be contended that this entire improvement, to its full cost, was not authorized by law.

V.

What was the legal status of these property owners in these two cases when these improvements were completed, and what rights and remedies had they?

This and other matters will be treated so exhaustively by the immediate counsel for the bank, my associates, that my view will be concisely expressed on one point only, and the rest of the argument remitted to their better labors.

It is to be presumed that the owners on Seventh street knew of the ordinances by which the street was to be improved, and that the work was entered upon; of the passage of the act of February 21, 1871; the appointment of the Board of Public Works, and their taking charge of said work upon said street.

In the original bill, they exhibit themselves as complaining that the whole cost of the work was not assessed upon them under the ordinances.

So, also, Shoemaker must have known of the new Gov-

ernment, the Board of Public Works, of what they were doing. At the least, when these parties found an hundred men, with horses and carts, tearing the earth up along the front of their property, they are to be charged with notice that somebody was to pay for something. On Seventh street, this was going on for a year and a half, and along Seventh-street road for over two years.

The first long and searching investigation by Congress, lasting from January to May, came, with all that was said and published of it, until, as matter of fact, every intelligent being in the District knew exactly what the Board of Public Works was doing, what they claimed their powers to be, and how and upon whom the cost of their labor was to be assessed. Yet all these parties quietly see all this going on, no one of them raised hand or voice, till the last stroke of work was complete, the costs summed up, and notice served on them severally to pay their just proportion of the cost. Then there was a scrambling on 7th street, and the first bill filed September 11, 1872, and Shoemaker filed his bill March 2, 1874, in the midst of the second congressional investigation.

By every element of justice and equity, these parties should now be precluded from questioning their liability to pay the several assessments against their property, and this seems to be the holding of the courts.

Hellenkamp *v.* Lafayette, 30 Ind., 192.
Webster *v.* San Francisco, 1 Cal., 455.
Kellogg *v.* Ely, 15 Ohio St., 66.
Wiggin *v.* The Mayor, 9 Page, 24.
The People *v.* Utica, 65 Barb., 21.
Cooley on Taxation, 573.

Respectfully submitted,

A. G. RIDDLE.

APPENDIX.

LEGISLATION OF CONGRESS AND OF THE LEGISLATIVE ASSEMBLY.

The Acts of the Board Approved and Confirmed.

APPENDIX A.

SPECIAL ASSESSMENTS.

The Powers and Duties of the Board of Public Works.

ORGANIC ACT OF THE DISTRICT OF COLUMBIA.

1. "SEC. 37. *And be it further enacted*, That there shall be in the District of Columbia a Board of Public Works, to consist of the Governor, who shall be president of said board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, and the others citizens and residents of the District, having the qualifications of an elector therein; one of said board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown.

2. "They shall hold office for the term of four years, unless sooner removed by the President of the United States.

3. "The Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and shall *also* have entire control of all other works which may be intrusted to their charge by the Legislative Assembly or Congress.

4. "They shall disburse upon their warrant all moneys appropriated by the United States, or the District of Columbia, or collected from property-holders, in pursuance of law, for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and shall assess, in such manner as

shall be prescribed by law, upon the property adjoining and to be especially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one third of such cost, which sum shall be collected as all other taxes are collected.

5. "They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the Legislative Assembly.

6. "All contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District;

7. "And said Board of Public Works shall have no power to make contracts TO BIND SAID DISTRICT to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made.

8. "All contracts made by said board in which any member of said board shall be personally interested shall be void, and no payment shall be made thereon by said District or any officers thereof.

9. "On or before the first Monday in November of each year, they shall submit to each branch of the Legislative Assembly a report of their transactions during the preceding year, and also furnish duplicates of the same to the Governor, to be by him laid before the President of the United States for transmission to the two houses of Congress; and shall be paid the sum of two thousand five hundred dollars each annually." (16 Stats., 427.)

SECOND.

The legislative power of the Legislative Assembly qualified and conditional.

ORGANIC ACT.

"SEC. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts

of the Legislative Assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted." (Act of February 21, 1871; Id., 423.)

APPENDIX B.

Mode of Assessment.

AN ACT prescribing the mode of assessment for special improvements, and providing for the collection thereof. Approved August 10, 1871.

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That whenever any of the improvements mentioned or referred to in section thirty-seven of the act entitled 'An act to provide a government for the District of Columbia,' approved the twenty-first day of February, one thousand eight hundred and seventy-one, shall be completed, a statement of the cost thereof shall be prepared by the Board of Public Works, and be filed in the office thereof; and immediately thereafter an assessment, based upon said statement, shall be made, as provided for in said section of said act, which assessment shall be collected by the said board in the same manner as other taxes of the District of Columbia are now or may hereafter be authorized to be collected.

"SEC. 2. *And be it further enacted*, That within ten days after making an assessment, the Board of Public Works shall give, or cause to be given, written or printed notice to each proprietor of property adjoining and specially benefited by any improvement of the amount assessed against the same, if he be a resident of the District of Columbia, and if he be a non-resident, to his tenant or agent, requiring the amount to be paid within thirty days from the date of such notice, and a return of such service shall be made to the said board, with proof of the manner in which the same shall have been served, and be filed among its records. And the service of such notice shall, in all cases, be either personal on said proprietor, agent, or tenant, or by pasting or placing a copy thereof on the property, as aforesaid, against which the assessment exists.

"SEC. 3. *And be it further enacted*, That if any person or persons, notified as aforesaid, shall neglect or refuse to pay the amount assessed against his or their property, as aforesaid, after the expiration of thirty days, the said Board of Public Works shall immediately thereafter issue certificates of indebtedness against the property assessed as aforesaid, which certificates shall bear interest, until paid, at the rate of ten per centum per annum; and until paid, the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year, the said board shall, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exist, or so much thereof as may be necessary to pay said assessment, such sales to be first duly advertised daily for three successive weeks in the regular issue of some newspaper published in the District of Columbia, and to be made by said board at public auction to the highest bidder; and a deed shall be given by the Governor, countersigned by the Secretary of the District of Columbia, which deed shall be deemed and held to be a good and perfect title to any property bought at any sale hereby authorized: *Provided*, That the owner of such real estate shall have the right to redeem the property so sold by paying the amount of the purchase-money, and twenty per centum thereon, within two years from the date of sale." (Laws Dist., pt. 2d, p. 31.)

* * * * * * *

This section amended by act of Congress, March 3, 1875.

APPENDIX B*a*.

"SEC. 3. *And be it further enacted*, That the collector of taxes shall, within sixty days after the expiration of the ninety days prescribed in the foregoing section, prepare a complete list of all real property in arrears, and publish such list twice a week for four successive weeks, in the regular issues of some newspaper published in the District of Columbia, and designated by the Governor, giving notice that if the said taxes due, together with the cost that may have accrued thereon, shall not be paid prior to the day named for the sale, the property will be sold by the said collector, at public auction, to the highest bidder. Upon the day specified

in such advertisement the collector shall proceed to sell any and all property upon which such taxes remain unpaid, and continue to sell the same from day to day, until all the real property in arrears as aforesaid shall be brought to auction. Immediately after the close of the sale, the collector shall, upon payment of the purchase-money, issue to the purchaser a certificate of sale; and if the property shall not be redeemed by the owner thereof within one year from the date of sale, by the payment of the amount for which it was sold at such sale, and fifteen per centum per annum thereon, a deed therefor, countersigned by the Secretary of the District of Columbia, and having affixed the seal of said District, shall be given by the Governor to the purchaser at the tax sale; which deed shall be deemed and held a good and perfect title in fee-simple to any property bought at any sale herein authorized."

APPENDIX C.

Georgetown.

AN ACT additional to and amendatory of an act entitled "An act concerning the District of Columbia."

"SEC. 11. *Be it enacted by the Senate, &c.*, That the corporation of Georgetown, in the District of Columbia, shall have full power and authority to tax any particular part or district of the town for paving the streets, lanes, or alleys therein, or for sinking wells, or erecting pumps, which may appear for the benefit of such particular part or district: *Provided*, That the rate of tax to be levied shall not exceed $2 per front foot, and that the same shall be enforced and collected in the same manner that the taxes which the said corporation have heretofore been authorized to lay and collect." (1 Stats., 195.)

May 3, 1802.

AN ACT to amend the charter of Georgetown.

"SEC. 12. *Be it enacted by the Senate, &c.*, * * * * In addition to the power heretofore granted to said corporation by the act of Congress entitled 'An act additional to and amendatory of an act entitled "An act concerning the District of Columbia," ' approved May 3, 1802, of laying a

tax of $2 per foot front for paving the streets, lanes, and alleys of the said town, they shall have the power, on petition (in writing) by a majority of the holders of all real property fronting on any street or alley, if in their judgment it shall be deemed necessary, to lay such further and additional sum on each foot front of said street or part of a street as will be sufficient to pave said street or part of a street, lane, or alley," &c. (2 Stats., 334.)

March 3, 1805.

APPENDIX D.

CHARTER OF WASHINGTON.

Assessments.

"SEC. 5. That * * * the said corporation shall have power to lay taxes on particular wards, parts of sections of the city, for their particular local improvements. * * * That whenever the proprietors of two thirds of the inhabited houses fronting on both sides of a street, or part of a street, shall, by petition to the two branches, express their desire of improving the same by laying the curbstone of the foot-pavement, and paving the gutters or carriage-way thereof, or otherwise improving said street, agreeably to its graduation, the said corporation shall have power to cause to be done, at any expense not exceeding two dollars and fifty cents per front foot of the lots fronting on each improved street or part of a street, and charge the same to the owners of the lots fronting on said street or part of a street in due proportion." * * * (2 Stats. at L., p. 725.)

May 4, 1812.

APPENDIX E.

Assessments.

(Acts of Congress conferring power on the Corporation of Washington to levy assessments for particular local improvements.)

"SEC. 8. *And be it further enacted*, That the said corporation shall have full power and authority to lay taxes on

particular wards, parts, or sections of the city, for their particular local improvements; and, upon the application of the owners of more than one half of the property upon any portion of a street, to cause the curbstones to be set and the footways to be paved, on such portion of a street, and to lay a tax on such property, to the amount of the expense thereof: *Provided*, That such tax shall not exceed three dollars per front foot; and, upon a like application, to cause the carriage-way of any portion of a street to be paved, or lamps to be erected therein, and light the same, and lay a tax, not exceeding the whole expense thereof, in due proportion, on the lots fronting on such portion of a street; and, also, to impose an addition or interest on the amounts of any such taxes, not exceeding ten per centum per annum, when the same shall not have been paid within thirty days after the same shall have become due. (3 Stats., 587.)

May 15, 1820.

"SEC. 2. * * * To take up and relay foot pavements and paved carriageways, and to keep them in repair, and to lay and collect taxes for paying the expenses thereof on the property fronting on such footways and carriageways."

May 17, 1848. (9 Stats., 223.) This act continued the charter twenty years.

APPENDIX F.

"SEC. 1. *Be it enacted by the Senate, &c.*, * * * * That the first paragraph of section eight of "An act to incorporate the inhabitants of the city of Washington," passed May 15, 1820, be amended so as to read as follows: 'That the said corporation shall have full power and authority to lay taxes on particular wards, parts, or sections of the city, for their particular local improvements, and to cause the curb-stones to be set, the foot and carriageways to be graded and paved, or so much thereof as they may deem best, and the necessary sewerage and drainage facilities to be introduced under and upon the whole or any portion of any avenue, street, or alley, and also to cause the same to be suitably paved and repaired, and to be at all times properly cleaned and watered, and also to cause lamps to be erected therein, and to light the same, and to pay the cost thereof out of the funds of the ward in which such im-

provement shall be made; this provision not to be construed as repealing, but being intended as auxiliary to, the power they already possess to make local improvements on the application of the owners of property benefited thereby.'" (13 Stats., 68.)

Also see act of February 23, 1865, 13 Stats., 434.

Appendix G.

AN ACT to pave the footway on the south side of Pennsylvania avenue, between Sixth and Seventh streets west, and for other purposes. Approved April 16, 1814.

"Whereas more than two thirds of the proprietors of occupied houses on square number four hundred and sixty-one, fronting on the south side of Pennsylvania avenue, between Sixth and Seventh streets west, have expressed their desire of improving the same, by setting the curb-stone and laying the foot-pavement agreeably to the graduation of the city of Washington; therefore

"SEC. 1. *Be it enacted by the Board of Aldermen and Board of Common Council of the city of Washington*, That a tax of two dollars and fifty cents per front foot of the ground or lots in the said square number four hundred and sixty-one, fronting on Pennsylvania avenue, between Sixth and Seventh streets west, be, and the same is hereby laid for the purpose hereinafter mentioned, to be collected in the manner as prescribed by law for the collection of other taxes on real property in the said city: *Provided*, That no more of the above tax be collected than will be necessary for that purpose.

"SEC. 2. *And be it enacted*, That it shall be the duty of the Commissioner of the Second Ward to ascertain the proper graduation of the said part of an avenue, the number of front feet, and the proportion belonging to each of the several proprietors, and deposit a certified plan thereof with the Register of the said city; and immediately after the 1st day of July next, the Commissioner of the Second Ward shall proceed to set the curb-stone, and to lay the foot-pavement with good paving brick, according to the graduation and regulation of the said city." * * * * * *

Chapter 15, p. 24, 11th Council.

See also acts of the Corporation, under date of April 16,

1814; June 27, 1814; August 6, 1814; July 1, 1815; July 1, 1815; July 12, 1815; July 12, 1815; July 20, 1815; July 20, 1815; September 21, 1815; November 11, 1815; May 10, 1816; March 15, 1817; March 15, 1817; October 19, 1817; May 20, 1818; May 20, 1818; July 11, 1818; July 11, 1818; July 11, 1818; October 19, 1818.

Appendix Ga.

Approval of Assessment Act.

AN ACT for the support of the government of the District of Columbia for the fiscal year ending June 30, 1876, and for other purposes. Approved March 3, 1875.

"SEC. 15. That the third section of the act of the Legislative Assembly of the District of Columbia, entitled 'An act prescribing the mode of assessment for special improvements, and providing for the collection thereof,' approved August tenth, eighteen hundred and seventy-one, shall be, and is hereby, amended so that the sales under said law shall be advertised twice a week for three successive weeks, instead of as heretofore required." (See 18 Stats., 505.)

Appendix H.

AN ACT for extending the time of payment of special assessments, and for other purposes. Approved May 29, 1873.

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That, for the purpose of extending, as in this act provided, the time of payment of the assessments for special improvements within the District, made by the Board of Public Works, the said board are hereby authorized to issue, and to use solely in the discharge of outstanding obligations, certificates of indebtedness for work done under the direction of the board, and chargeable to the private property benefited thereby, in denominations of fifty dollars, or any multiple of that sum, dated July first, eighteen hundred and seventy-three, payable to bearer, with interest semi-annually from July first, eighteen hundred and seventy-three, at the rate of eight per centum per annum, countersigned by the Commissioners of the Sinking Fund, and

registered by the Comptroller of the District, to an amount not exceeding in all the sum of two millions of dollars, and not exceeding the amount chargeable to private property, as aforesaid, for work done or in progress of execution under existing contracts, and payable, not exceeding one fifth of said sum at the end of each year, from July first, eighteen hundred and seventy-three, until July first, eighteen hundred and seventy-eight, which certificates shall be receivable at any time in payment of such assessments for special improvements.

"SEC. 2. *And be it further enacted*, That, for the purpose of securing the payment of the principal and interest of such certificates of indebtedness, the Board of Public Works are hereby required to deposit with the Commissioners of the Sinking Fund of the District of Columbia all certificates hereafter issued by said board on account of assessments for special improvements against the property adjoining and benefited thereby, in accordance with the act of the Legislative Assembly of August tenth, eighteen hundred and seventy-one; and such assessment certificates and all payments thereon shall be, and hereby are, pledged to, and shall be received, held, and applied, under the direction of said commissioners, for the payment of the principal and interest of the certificates of indebtedness authorized by this act, and for no other use or purpose whatever.

"SEC. 3. *And be it further enacted*, That the time for paying all assessment certificates which have been or may be issued by the Board of Public Works, under said act of the Legislative Assembly of August tenth, eighteen hundred and seventy-one, shall be extended so that the amount of each certificate shall be payable in five equal annual installments from the date of said certificates, with interest at the rate of ten per centum per annum until paid; and in case of default in the payment of any installment, the property against which the assessments and certificate exists, or so much thereof as may be necessary to pay said installment, with interest, costs, and charges, shall be sold and subject to redemption, as provided in said act of August tenth, eighteen hundred and seventy-one; but at any time after the making of any assessment, and before sale, the owner of the property may pay the whole or any installment thereof, with interest, costs, and charges.

"SEC. 4. *And be it further enacted*, That all assessment certificates heretofore issued by the Board of Public Works and not paid in full at the expiration of one year from their

date, shall, on request of the holders, and on due assignment thereof, be purchased by the Commissioners of the Sinking Fund, and held and collected on their account, as provided by sections two and three of this act; and if necessary to provide means for purchasing said assessment certificates, the Board of Public Works are hereby authorized and required, upon requisition of said commissioners, to make an additional issue of certificates of indebtedness similar to those authorized by section one of this act, not exceeding the amount of assessment certificates so purchased.

* * * * * *

"SEC. 9. *And be it further enacted*, That in view of the emergency arising from the necessity for the immediate payment by the Board of Public Works of outstanding claims for work done in the improvement of the District, this act shall take effect immediately upon its passage." (Laws of the Dist., 1873, p. 39.)

APPENDIX I.

Acts of Legislative Assembly—First Improvement Act.

AN ACT making appropriations for improvements and repairs in the District of Columbia, and providing for the payment thereof. Approved July 10, 1871.

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That the sum of four millions of dollars is hereby appropriated until the expiration of the first fiscal quarter after the adjournment of the next regular session of the Legislative Assembly, for the improvement and repairs of the streets, avenues, alleys, and roads in the District of Columbia, and for the construction and repairs of sewers, bridges, and other public works therein, to be used and expended according to the provisions of the act of Congress of the United States, entitled 'An act to provide a government for the District of Columbia,' approved February twenty-one, eighteen hundred and seventy-one, and as fully as may be practicable and consistent with the public interest, in conformity with the plan of improvement submitted to said Legislature by the Board of Public Works of said District, in its communication bearing date June twenty, eighteen hundred and seventy-one.

"SEC. 2. *And be it further enacted*, That in no case shall the said board enter into a contract for any work or improvement the cost of which shall exceed the amount estimated therefor in its aforesaid plan, less twenty per centum of said estimates; and that no member of the Council or House of Delegates, or person holding any office of trust or profit under the District of Columbia, shall be pecuniarily interested, either directly or indirectly, in any such contract, and no payment shall be made on account of any contract in which any such person shall be so interested.

"SEC. 3. *And be it further enacted*, That the appropriation hereby made shall be disbursed upon warrants of said Board upon the treasury of the aforesaid District, and in no other manner, and no warrant shall be drawn for any improvement or work, or under any contract therefor, unless the work done and accepted shall be at least ten per centum in excess of such warrant, except in cases of final settlement.

"SEC. 4. *And be it further enacted*, That the aforesaid four millions of dollars shall be paid out of the general improvement fund herein provided for, and be charged against the cities of Washington and Georgetown and the county of Washington, in the proportion of the improvements which shall be made therein, and that special taxes, in accordance with section thirty-seven of the organic act, shall be levied in sections, wards, or districts of Washington, Georgetown, and the county of Washington, to pay the cost of the particular local improvements which may be made therein according to the plan of the Board of Public Works aforesaid.

"SEC. 5. *And be it further enacted*, That to enable the Board of Public Works to commence and proceed immediately, and until the expiration of the first fiscal quarter after the adjournment of the next regular session of the Legislative Assembly, with the improvements and work hereinbefore mentioned, as hereinbefore provided, the Governor is authorized and empowered, in behalf of the District of Columbia, to issue, or cause to be issued, registered or coupon bonds, designated on their faces "permanent improvement bonds," to an amount not exceeding four millions of dollars, one million and one half of which may be sold during the year one thousand eight hundred and seventy-one, and two millions and one half during the period ensuing between the first day of January, one thousand eight hundred and seventy-two, and the expiration of the first fiscal

quarter after the adjournment of the next regular session of the Legislative Assembly as aforesaid, in denominations of fifty, one hundred, five hundred, and one thousand dollars; the said bonds to be payable within twenty years from the date of their issue, and to bear interest, payable semi-annually, at the rate of seven per centum per annum. And for the punctual payment of the interest, and the redemption as herein provided, the faith of the government of the District of Columbia is hereby pledged.

* * * * * *

"SEC. 9. *And be it further enacted*, That in view of the emergency arising from the necessity for the improvement and repair of the streets, avenues, alleys, sewers, roads, and bridges in the District of Columbia, this act shall take effect immediately upon its passage." (Laws Dist., pt. 2d, p. 10.)

This act was especially approved by Congress in the act of May 8, 1872. (17 Stats., 87.)

APPENDIX K.

AN ACT making appropriations for improvements and repairs in the District of Columbia, and anticipating the revenue for the purpose of providing for the payment thereof. Approved August 11, 1871.

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That the Governor is hereby authorized to anticipate the revenue of the District, which may arise from the assessment and collection of taxes during the current year, to the amount of five hundred thousand dollars, which sum shall be expended and disbursed for the improvement and repairs of the streets, avenues, alleys, and roads in the said District, and for the construction and repairs of sewers, bridges, and other public works therein, according to the provision of the thirty-seventh section of an act of the Congress of the United States, entitled 'An act to provide a government for the District of Columbia,' approved February twenty-one, eighteen hundred and seventy-one.

"SEC. 2. *And be it further enacted*, That in view of the emergency arising from the necessity for the improvement and repairs of the streets, avenues, alleys, sewers, roads, and bridges in the District of Columbia, this act shall take effect immediately upon its passage." (Laws Dist., pt. 2d, p. 35.)

Supreme Court of the United States.

GEORGE MATTINGLY, GEORGE E. KIRK, HENRY K. RANDALL, ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA ET AL.

No. 62.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

WILLIAM A. COOK,
WALTER S. COX,
Solicitors for Appellee,
First National Bank of New York.

WASHINGTON, D. C.
GIBLON BROTHERS, PRINTERS.
1878.

Supreme Court of the United States.

GEORGE MATTINGLY, GEORGE E. KIRK, HENRY K. RANDALL, ET AL., APPELLANTS, *vs.* THE DISTRICT OF COLUMBIA ET AL. } *No.* 531.

Appeal from the Supreme Court of the District of Columbia.

HISTORY OF THE CASE.

Prior to 1871 the District of Columbia was divided into three separate municipalities or local governments, consisting of the city of Washington, Georgetown, and the Levy Court. The Levy Court embraced all of the county of Washington, of which the District of Columbia is composed, except the territory of Washington city and Georgetown.

The Forty-first Congress, third session, passed an act entitled "An act to provide a government for the District of Columbia," which was approved February 21, 1871. (16 St. at L., p. 419.)

By the 37th section of this act, a Board of Public Works was created, consisting of the governor and four others, who were authorized to be appointed on the nomination of the President, by and with the confirmation of the Senate.

This Board was appointed and commissioned shortly after

the passage of the act, and entered upon its duties on the 16th day of March, 1871.

The general power conferred on the Board was in these words, viz: "The Board of Public Works shall have entire "control of and make all regulations which they shall deem "necessary for keeping in repair the *streets*, avenues, alleys, "and *sewers* of the city, and all other works which may be "entrusted to their charge by the Legislative Assembly or "Congress."

When it entered on the performance of its duties and took control of the streets, etc., contracts, extending for about one year, for improvements, existed between the city of Washington and different contractors, and, among others, with George W. Linville, for the improvement of Seventh street, by the construction of a wooden pavement from B street to Water street, and also for the construction of sewers from canal to G street. These contracts were made *after* the Board of Public Works had regularly entered upon the performance of its duties.

The contract with Linville was dated March 30, 1871, and was made agreeably to ordinances of the municipality of Washington, approved May 9, 1870, June 10, 1870, and March 28, 1871.

The Board of Public Works, having control of the street, on the 3d day of July, 1871, addressed a letter through William Forsyth, its first assistant engineer, to Linville, the contractor, by which he was directed to build the sewer along Seventh street of different dimensions, and to some extent different material, from that provided for in his contract with the city of Washington.

The change consisted chiefly of enlarged dimensions of the sewer, the substitution of "Scotch pipe" for an ordinary tile, and an extension from Water street to the Potomac river as an outlet.

These alterations were made because the Board of Public Works regarded the sewers, as originally contracted for, in-

adequate* and of inferior material, and to secure a more perfect connection.

The modifications of the contract were accepted by the contractor, in a letter dated 12th July, 1871. On the 14th day of October, 1871, the Board of Public Works entered into a contract with Albert Gleason to lay sidewalks and gutter-ways to traps and other work not included in Linville's contracts, but necessary for the proper completion of the improvements.

This was after appropriation had been made by the Legislative Assembly on 10th July, 1871, and 11th of August, for improvements.

On the 20th day of April, 1871, Congress, in the "Deficiency Appropriation Law," distinctly recognized the legal control of the Board of Public Works over the improvement, and provided that private property should be "assessed for "the improvement of * * Seventh street southwest, from "B street to the river, heretofore authorized by law, as pro-"vided in the act February twenty-first, eighteen hundred and "seventy-one." (U. S. Stat. at Large, vol. 16, p. 309.)

On the 10th day of August, 1871, the Legislative Assembly, which had been elected and met in May, passed "An "act prescribing the mode of assessments for special improve-"ments and for the collection thereof." This act was approved August 10, 1871.

The improvements were completed in the month of December, 1871, and shortly thereafter an exact statement of the cost was prepared and filed in the office of the Board of Public Works, amounting in the aggregate to $165,462.50, of which amount $11,716.14 was charged to the United States, and paid by it; $6,130.65 to the District of Columbia, on account of its separate property, and $7,068 to the Washington and Georgetown Railway Company, making a total of $24,914.79. This, deducted from $165,462.50, left $140,547.77, two-thirds of which, viz., $93,698.48, was charged to the Dis-

* The correctness of this opinion has been established by time. Even the enlarged sewer has been at times inadequate to carry off the water.

trict of Columbia generally, and only $46,849.23, or one-third, to the property-holders along the line of the improvements; an amount which equalled 8.74\frac{11}{100}$ per foot.* (Transcript of record, pp. 52–3–4.)

As soon as practicable after the completion of the statement of the cost and the ascertainment of the amount chargeable against each piece of property, the respective owners were notified of the amount of the assessment, as well as to pay the same. The complainants having failed to pay the assessments against their property, in accordance with the notices served on them, separate certificates of indebtedness were issued against the lots of complainants, as provided by the act of the Assembly of the District of Columbia, passed on the 10th day of August, 1871, and afterwards, about the 14th day of November, 1872, the First National Bank of New York became the purchaser thereof for a full and valuable consideration in the regular course of business.

During the execution of the work no objections appear to have been made on the part of any or all of the complainants. On the contrary, they seemed to have acquiesced in the improvements during their progress up, until their completion, and for eight or nine months thereafter. And it was only after the United States and the District had paid their parts of the cost, and when the complainants were called on to pay the assessments against them, that they "found fault" with either the plans of the work, its material, the manner of execution, or the cost.

The notices of assessment were "sent out" about August 1, 1872.

The complainants, on the 11th of September, 1872, *united*

* Under the original contract, and the old law of the city of Washington, the entire cost would have been chargeable to the property-holders, excepting a small portion for man-holes, &c.

in a bill, and obtained a restraining order against the collection of the assessments. The complainants numbered *forty-four*. Their property was *individual and separate*, and the amounts charged against them were *distinct and different* in amounts.

To this bill the Board demurred on the 19th of September, 1872, for multifariousness, and for want of equity; and also answered the parts of the bill not demurred to. A separate answer was filed on behalf of the District of Columbia, and by Albert Gleason* and George W. Linville.

On the 25th day of September, 1872, the motion for an injunction was denied, but Gleason and Linville were enjoined from receiving, and the District of Columbia from paying them, any part of 5 per cent. of the balance of the cost of the work admitted to be due and retained. And the complainants were granted leave to amend their bill, and the Board of Public Works ordered to pay into the District treasury any money received by it on the assessments.

On the 1st day of October, 1872, the complainants filed their amended bill, on which a restraining order was issued as on an "*original bill*," and on the 9th day of October an injunction bond was filed.

On the 26th day of October the amended bill was answered by the Board of Public Works.

On the 19th day of October the case was certified to the general term.

On the 26th day of October, 1872, the District of Columbia filed its answer to the amended bill, and on the same day the District of Columbia demurred to several paragraphs of the bill on the ground of the want of equity.

On the 9th day of November, 1872, the counsel for complainants filed a motion to withdraw their application for an injunction on the amended bill, and to dismiss the rule; which motion was granted, and an injunction on the *amended* bill accordingly denied.

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* A contract was made with Gleason by the Board of Public Works, on the 14th day of October, 1871. (See printed record, p. 22.)

On the 29th day of November, 1872, the complainants joined issue with the defendants "on the *bill, answer, and* "*testimony.*"

On the 17th day of December, 1872, the defendants moved the court to dismiss the bill because of a failure of the complainants to file a replication within ten days. And on the 28th day of December this motion was denied. On the same day the time was extended for taking testimony on behalf of the complainants, and also on the 29th day of January, 1873.

From the order refusing to dismiss the amended bill for want of a replication, an appeal was taken on the 28th day of January, 1873, and on the 30th day of January, 1873, a motion was filed to dismiss the appeal on the ground that the order was one of discretion only, and did not involve the merits of the case.

On the 11th day of September, 1873, the complainants filed what they designated a "protest and tender of payment," in which they objected to the bills rendered them, and stated that they tendered and held themselves ready and willing to pay to George W. Beall, assessor and collector of the Board of Public Works, one-fifth part of the instalments due, as provided for in an act for extending the time for the payment of special assessments, and for other purposes, approved May the 29th, 1873. This was one year after the filing of the original bill, and about the same time after the First National Bank of New York became the *bona fide* purchaser of the certificates. This act could not affect outstanding certificates in the hands of *bona fide* purchasers, and expressly provided that they might be purchased or taken up ("*at the request* "*of the holders,*" and an assignment,) by the Commissioners of the sinking fund of the District, out of funds in their hands, if sufficient, and if not, that certificates of indebtedness should be issued for that purpose. No tender of money was, however, made, and none was paid into court, and none to the Board, or District, or the holders of the certificates. The only money at any time paid was that ordered by the court to be paid.

On the 13th day of September, 1873, the complainants filed a motion for leave to file a supplemental bill. On the 19th day of September, 1873, this motion was allowed, and the supplemental bill filed.

On the 30th day of September, 1873, a motion was made to rescind the order allowing the supplemental bill to be filed.

On the 3d day of October, 1873, a petition was filed to allow 33 other persons to become complainants.

On the 7th day of November, 1873, a decree was passed that the supplemental bill be taken *pro confesso* against the defendants. On the 19th day of November this confession was set aside, and leave given the defendants to file answers, which was done on the same day both by the District of Columbia and the Board of Public Works.

On the 11th day of November, 1873, an order was made authorizing the attorney of the District of Columbia to receive money deposited by the complainants in court.

On the 19th day of November, 1873, the First National Bank of New York was allowed to become a party plaintiff or defendant, and on the 29th day of January, 1874, its answer was filed.

On the 12th day of February, 1874, the complainants "joined issue" with the defendants, the Board of Public Works and the First National Bank "on *the original and supplemental* " *bills, the answers, and testimony.*"

On the 10th day of March, 1874, the case was certified to the general term, and on the 12th day of May, 1874, the case was heard, and the bills of the complainants dismissed. From this decree the complainants appealed to this court.

The Original Bill.	*Answer of the Board of Public Works.*	*Answer of Albert Gleason.*	*Answer of Geo. W. Linville.*
1. The first paragraph states that the complainants are citizens of the city of Washington and the District of Columbia, and sue as owners and holders of certain real estate, in their own behalf and in behalf of all others similarly circumstanced who may come in, &c.	1. Admits the residence of the complainants as stated in the first paragraph of the bill, and their interest in the real estate therein mentioned, but denies that they have any joint interest therein or identity of interest in the subject-matter of the suit, and avers that they are separate owners thereof, with no common interest in the amount of assessments against them or their property, and that complainants are improperly joined in their suit. This paragraph of the bill is also demurred to by the Board of Public Works for multifariousness.	1. He admits the allegation of the first paragraph, except that he says complainants have no joint interest authorizing them to join in this suit, or one on behalf of themselves and others.	1. He admits the allegation of first paragraph, except that he denies that complainants have the right to join in a suit for the matters stated in the bill.
2. The second paragraph sets forth that, "The District of Columbia is a "body politic and corporate by act of "Congress approved February 21, "1871, entitled 'An act to provide a "government for the District of Co-"lumbia,' and that defendants, Cooke, "Shepherd, Magruder, Mullett, and "Brown, are residents of the District "and compose the Board of Public "Works provided for by the 37th "section of said act."	2. They admit that they constitute the Board of Public Works.	2. He admits the allegation of the second paragraph.	2. He admits the allegations of the second paragraph.
3. The third paragraph states that complainants were, prior to 30th day of March, 1871, and still are, *severally* seized in fee-simple, or otherwise owners of certain lots of land in the city of Washington bounding on the line of Seventh street west, between B street south and the Potomac river.	3. They admit that complainants are owners of real estate, as set forth in the third paragraph.	3. He admits the allegations of the third paragraph.	3. He admits the allegations of the third paragraph upon information and belief.
4. The fourth paragraph charges that complainants have been *assessed* by the said District and Board, and directed to pay to said Board certain	4. They admit that assessments have been made against the property of complainants for sewerage and paving on Seventh street west, adja-	4. He has no knowledge or belief as to the fourth paragraph.	4. He has no knowledge or belief in relation to the fourth paragraph.

The Original Bill—Continued.

specified sums of money for certain alleged improvements, sewerage, and pavements constructed on said Seventh street west, adjacent to and in front of the premises of complainants. That they have been notified by said Board that said lots have been assessed for such special improvements at the rate of $8.74 41-100 per front foot, and exhibits a schedule of such assessment, which is marked Complainants' Exhibit No. 1. And that defendants have notified complainants, *individually and severally*, that in case of neglect to pay the amounts assessed against them, the said Board, after the expiration of thirty days, will immediately issue certificates of indebtedness against said property of complainants, which assessment and certificate are declared to be a lien upon said lots, in pursuance of an act of the Legislature of the District of Columbia approved August 10, 1871, and a copy of said notice and act is filed with said bill, marked Complainants' Exhibit No. 2. And that complainants are further notified that if said assessment, with interest at 10 per centum per annum, remain unpaid for one year, the said Board, upon application of any holder of said certificates, will proceed to sell said property, or a proper part thereof.

5. The complainants charge that in pursuance of three several ordinances of the Mayor, Board of Aldermen, and Common Council of the city

Answer of the Board of Public Works—Continued.

cent to and in front of complainants' lots; but they deny that this has been done by the District of Columbia, but that under the act of Congress of February 21, 1871, and the act of the Assembly of the District of Columbia, approved August 10, 1871, said assessment can only be made by the Board of Public Works, and the District has nothing to do with it. They admit that said assessments amount to $8.74 41-100 per front foot of said lots, and that complainants have each been notified that if the same be not paid in thirty days, said Board will issue certificates of indebtedness against said property, and that said notices were given on or about the 14th, 15th, 16th, and 17th days of August, 1872. They admit that certificates if issued would be a lien on said lots, but not on them jointly, but on each lot *separately* for its proportionate share. And they answer that said assessments are, of themselves, no lien upon said lots, and none can arise except by the *neglect of complainants to pay*, in which event only certificates will be issued. They admit that certificates if issued will bear interest at 10 per centum per annum, and that if they should remain unpaid for one year, the Board would cause a sufficient portion of said lots to be sold to pay the same on request of the holders.

The fourth paragraph is also demurred to, so far as relates to its general statement, for want of equity.

5. They admit the allegations of the fifth paragraph in relation to the ordinance of the late corporation of the city of Washington for the con-

Answer of Albert Gleason—Continued.

5. He admits the contents of the fifth paragraph, on information and belief.

Answer of Geo. W. Linville—Continued.

5. He admits entering into a contract on 30th March, 1871, with Mayor, &c., of Washington to construct a sewer in Seventh street west,

The Original Bill—Continued.

of Washington, approved, respectively, May 9 and June 10, 1870, and May 28, 1871, which ordinances are exhibited with the bill, marked No. 3, the said Mayor, Board of Aldermen, and Common Council, on the 30th day of March, 1871, entered into a contract with defendant, G. W. Linville, whereby, in consideration of certain sums agreed to be paid him, said Linville contracted to construct a sewer in said Seventh street west, from Virginia avenue to the Potomac river, with manholes, drops, traps, and lateral branches; and to pave the carriage-way thereof from B street south to Water street, with the Follansbee wooden pavement, and do all the necessary grading and furnish all the sand and gravel to make said pavement complete, in accordance with certain proposals and specifications signed by the said Mayor of Washington and the said Linville. A copy of said contract, proposals, and specifications are filed as Exhibit No. 4.

6. That, subsequently, the said Linville having entered upon the performance of said work, the charter of the city of Washington was repealed by the aforesaid act of Congress, and the District of Columbia, by virtue of the same act, succeeded to all the rights and privileges of the Mayor,

Answer of the Board of Public Works—Continued.

struction of a sewer on Seventh street west, and for a pavement, and that a contract for said work was entered into with Linville, and that Exhibit No. 4 with the bill is a copy of the same.

6. They admit that Linville entered upon the performance of said contract, and that afterwards the charter of the city of Washington was repealed, and in lieu thereof a government was established as per said act of Congress of 21st February, 1871, but deny that by virtue of said act the

Answer of Albert Gleason—Continued.

6. He neither admits nor denies, except so far as the matters relate to the general knowledge of the people of the District, and he believes them to be true.

Answer of Geo. W. Linville—Continued.

from Virginia avenue to the Potomac river, and for paving said street from B street to Water street.

This contract was made after the passage of the act of Congress of 21st February, 1871, and after the appointment and confirmation of the Board of Public Works; and he is informed that on the 22d May, 1871, the Supreme Court of the District decided the contract to be illegal. Anxious to proceed with the work, he consulted with the Board, and they authorized him to proceed with the pavement, but determined to modify the contract in relation to the sewer, and the same was modified as shown by Exhibits Nos. 1 and 2 with his answer. On 4th August, 1871, he was directed to have all lateral sewers and openings properly constructed and connected with the Seventh street sewer; also gas and water connections made, and be assessed thereto. In December he was directed to have foot crossings placed on Seventh street at foot of L; also sidewalks from the intersection to the point where wooden pavement exists on Water street. Under these modifications and directions he proceeded to do all of said work in good faith; he did no work without agreements in writing therefor.

6. He neither admits nor denies.

The Original Bill—Continued.

Board of Aldermen, and Common Council of the city of Washington. Whereupon, the said Board of Public Works assumed the control and direction of the said sewer, pavement, and other work to be done under said contract.

7. That subsequently, by an order bearing date July 3, 1871, the said Board of Public Works, *illegally, and without any warrant whatever of law,*

Answer of the Board of Public Works—Continued.

District succeeded to all the rights of the mayor, board of aldermen, and common council of Washington, and that thereupon the Board of Public Works assumed control of said works. But they aver the fact to be that the charter of said city was continued in force for the purpose of executing all legal contracts *without designating any person* to see to the execution thereof, all the officers of said corporation having ceased by virtue of said act of Congress, and by the 37th section of said act the *Board of Public Works* was given entire control of the streets, avennes, sewers, and alleys of the city of Washington, placing said Board in charge of *all finished as well as commenced* sewers and pavements, and by virtue of another act of Congress, to supply deficiencies in appropriations for the year ending June 30th, 1872, approved April 20, 1871, said improvements on Seventh street were *required to be assessed* against private property as provided in the act of February 21, 1871, on adjoining property benefited thereby, in such mode as should be prescribed by the District Legislature, and they aver that the cost of said work of which complainants complain has been assessed on said property in accordance with said act and not otherwise, and in all respects correctly, as will appear by reference to affidavit of Wm. Forsyth filed with the answer as Exhibit "A."

7. They admit that they ordered the dimensions of the sewer to be changed, but deny that it was illegal. And they aver that after they had en-

Answer of Albert Gleason—Continued.

7. He has no knowledge or belief.

Answer of Geo. W. Linville—Continued.

7. He admits that the Board by an order of July 3d, 1871, directed him in a different manner and of different dimensions from those provided

The Original Bill—Continued.

and in violation of said contract, directed said Linville to construct said sewer in a different manner and of different dimensions from those specified in said contract; and that said Linville, in compliance with said order, constructed said sewer in a manner and of dimensions different from the specifications of said contract, and without any valid contract entered into with said Board, as required by law, whereby the cost of said sewer was greatly enhanced, and the liabilities of complainants increased.

8. That the work of said sewer, paving, and other work was badly done, and did not correspond to to the requirements of said contract and specifications; that in the construction of said sewer the earth, as filled, was not puddled, and there was *no systematic inspection* of said work as it progressed; that the foundation of the pavement is not of clay, free of loam, and rammed and rolled as required by the contract, and that not more than three inches of gravel on the average has been laid under said pavement, and the same not rolled or rammed, while the contract required eight inches of gravel and four of sand. That said work, in consequence, will last only a brief time, and complainants thus unjustly subjected to expenses for repairs.

Answer of the Board of Public Works—Continued.

tered upon their duties as members of said Board, they became convinced that said sewer, as contracted for between Linville and the city of Washington, *was inadequate* for the drainage of the locality in which it was to be constructed, and ordered its dimensions changed as set forth in complainants' Exhibit No. 4, to which change Linville assented. They aver that said *change was wise and judicious*, and did not greatly, but did to some extent, enhance the liabilities of complainants, and was of great and increased benefit to them, and they say their action in this respect was legal and proper, and refer to the answer of their co-defendant Gleason, paragraph 12.

8. They deny that the work of said sewer and pavement was *badly done* in many parts, and they deny the several specifications in relation thereto in the 8th paragraph of said bill, and especially that said work will last but a brief time, and complainants subject to further assessment for repairs in a brief time. And they aver that the work was *well and carefully done, under regular inspection*, and with a view to make it good and sufficient for the purposes intended, and that it will require only such incidental repairs as is common to such work.

Answer of Albert Gleason—Continued.

8. He denies that the work referred to in the eighth paragraph of the bill was imperfectly and badly done, and will last but a brief time, and complainants subjected to further costs for repairs; and on personal knowledge he says that in the construction of said sewer the earth as filled was puddled, and rolled and rammed; that the foundation of the pavement is clay, free of loam, said foundation being an old, solid road-bed, which it would have been injudicious to remove; and that on the top of said clay foundation there was a sufficient layer of gravel, and the required quantity of sand was placed thereon, and properly rammed and rolled; he denies that there was no systematic inspection of the work; and avers that it was regularly inspected each day by inspectors appointed by the Board of Public Works; that said work was

Answer of Geo. W. Linville—Continued.

for in the contract with the city of Washington.

He denies that said Board had no authority to modify the same. He denies that he did any work without a legal contract therefor. He admits that the cost of the sewer was to some extent enhanced by the change, but how much he is not informed. He denies that the liabilities of complainants were thereby unjustly or illegally increased, and says their property *was enhanced in value to the full amount of the cost of said work charged against it.* Of his own knowledge he says that said sewer as originally projected was not adequate.

8. He denies that the work was imperfectly or badly done, and that it will last but a short time, and complainants be subjected to expense for repairs. He says it was done in accordance with his contract, and well done, and of good material; and that the earth as filled was puddled and rammed, and that the foundation for the pavement was clay with a sufficient layer of gravel, and the required thickness of sand on top, and was properly rolled and rammed, and was regularly inspected by the persons appointed by the Board for the purpose.

The Original Bill—Continued.	*Answer of the Board of Public Works*—Continued.	*Answer of Albert Gleason*—Continued.	*Answer of Geo. W. Linville*—Continued.
		well and carefully done, and of good and proper material, and there is no just ground for the statements of this paragraph of the bill.	
9. The ninth paragraph charges if the work had been properly done in accordance with the said contract and specifications and a fair and just assessment made upon their property, it would not have exceeded $2.64 per front foot chargeable upon complainants' property, and that no more than that is now justly due from them upon a fair accounting. That inasmuch as the work has been defectively and improperly done, they are not chargeable with any sum.	9. They deny each and all the allegations of the ninth paragraph of complainants' bill.	9. He made no estimates of the entire cost of said work, and does not deny or admit the statements in relation thereto contained in the ninth paragraph of said bill; but he denies the allegation of said ninth paragraph that the work was imperfectly or improperly done.	9. He has no knowledge about the cost of the work, but denies the allegation about the improper manner in which the work was done, as in the former paragraph.
10. That when complainants received the notice of said assessment they demanded of the Board an itemized statement, but none was furnished them; but a statement was soon afterwards published in one of the newpapers of the city of Washington, which they have reason to believe was intended by said Board to be such itemized statement, and they file same with the bill marked Exhibit No. 4.	10. They admit that some of the complainants called for a bill of items of said assessments, but deny their legal right to the same. But desiring to furnish all information, and it being difficult to furnish a bill of items to each who might apply, they caused a bill of items to be published in two newspapers in the city, and a copy thereof is attached to complainants' bill as Exhibit No. 4.	10. He has no knowledge of the matters contained in the tenth paragraph, and neither admits nor denies the same.	10. He has no knowledge of the matter in the tenth paragraph.
11. That said assessment is *fraudulent, excessive, and illegal in divers particulars*, and especially in these, among others: That the sum of $577 charged for *superintendence* is illegal; that each lot is charged with a proportionate share of the costs of the entire street, whereas it should only be charged with its proportionate share of the costs of the improve-	11. They *deny on personal knowledge, and on information and belief, that said assessments are fraudulent, excessive and illegal, in whole or in particulars;* that $557 was actually and necessarily paid for superintendence of said work as it progressed; that the addition of 11 43-100 cents per foot was necessary in consequence of exemption of church and school	11. He has no knowledge in relation to the assessments made against complainants' property, but he denies that the curbing referred to in said paragraph eleventh was unnecessary, but that it was necessary in order to complete the paving as required to be done. And he says that wherever the old curbing was fit to be used it was reset, and no charge was made for the	11. He denies each and every allegation of the eleventh paragraph, so far as they relate to him and the work done by him, whether as respects the character of the work or the material, and denies all allegations of fraud.

The Original Bill—Continued.

ments of the street immediately adjoining thereto; that said assessment includes the costs of the work in front of *school-houses and churches*, a proportionate share whereof, amounting to about $0.11 43-100 per front foot, is charged upon complainants' property; that the sum of five per centum of the total costs, to wit, the sum of $7,879.16 is arbitrarily added to the total cost; that said assessment includes curbing the street with new curb and paving the sidewalks, for which complainants believe *no contract* ever existed, and which was wholly unnecessary from the condition thereof, and complainants' lots were remote therefrom and not benefited thereby; that said assessment includes certain work alleged to have been done by Albert Gleason, which was done without *legal* authority; that said assessment includes the cost of a six-foot sewer along Water street, between Sixth street west and Seventh street, *not provided for in the contract* with Linville, or in any contract as they believe, and not chargeable in any event on complainants' property abutting on Seventh street; that the old material formerly used in paving said Seventh street and sidewalk, removed by said work, of great value, were removed by defendants and their agents and converted to their own use, and complainants allowed no credit therefor in making said assessment; that various charges made for portions of the work mentioned in said itemized statement are *excessive*, and that said work has been very much over measured.

Answer of the Board of Public Works—Continued.

property, which exemption is declared by act of Congress approved June 27th, 1870, and an act approved April 20th, 1871, requiring assessments to be made on private property.

They deny that $7,879.16 or 5 per cent. on total cost is arbitrarily added; they say said sum was necessary for contingent expenses of said work, including engineering and other matters essential to carrying on the work, and customary in the execution of similar work, and they aver that only one-third of said contingent expenses, viz., $2,626.38, or $1\frac{2}{3}$ per cent., instead of 5 per cent. on the total costs, has been included in said assessments, and this was necessary in order that one-third of the entire costs of said work should be charged on the property specially benefited thereby, as required by law.

They deny that each lot should only be charged with its own *special* improvements, but that by the act of Congress of February 21, 1871, and the act of Assembly of the District approved August 10, 1871, not exceeding one-third of the whole cost of the work may be charged *on the property specially benefited thereby*, and they aver that said assessments have *only* been made upon the property *adjoining and specially benefited thereby*.

They *deny* that said assessment includes curbing of the street and paving of the sidewalk, which was unnecessary from the condition thereof, and that lots of complainants remote *remote* therefrom and not benefited thereby have been assessed therefor.

They deny that certain work done

Answer of Albert Gleason—Continued.

material; that some of the old curbing, unfit to be reset, was taken by the property-holders along the improvement and disposed of by them. Mattingly and Shea, complainants, are among those who took old material and sold it. He further says that the new curbing was the best bluestone, and denies that any work was done by him without authority of law. And he says that, on the 14th day of October, 1871, he contracted with said Board to lay the sidewalks and gutter-ways to traps, and other work, on Seventh street west, between B street south and the Potomac river, at certain prices agreed upon. He avers that the work done by him on said street was done by proper authority, and well and properly done.

He denies that any old material was taken away by him or his agents or employés, and converted to their own use. He bought some of said old material from property-owners along said street, and paid for them, and received some from the Railroad Company taken up within two feet of the track. And this is all of the old material that in any way came to his possession.

Answer of Geo. W. Linville—Continued.

The Original Bill—Continued.

Answer of the Board of Public Works—Continued.

by Gleason was done without authority, and say they *had a contract with him, dated October* 14, 1871.

They aver that the six-foot sewer along Water street was *necessary* for a proper outlet for the sewerage of Seventh street; that the same only extended about one square, to afford an outlet to the river, and that without it the Seventh-street sewer would have been overcharged, to the great detriment of the property along Seventh street, and the same was made in pursuance of a contract between the Board and said Linville. The necessity for such sewer appears by the affidavit of Gleason filed with the answer, marked "A."

They *deny* that old material—curbing, cobble-stones, brick, &c.—was removed by defendants, or agents, or employés, and converted to their own use, but that all of said old material that was fit for use was used in said work, and no charge therefor made against the property of complainants. They deny that various charges for portions of said work, as stated in Exhibit No. 4, are extravagant and excessive, and they deny that said work was overmeasured, but say that it was accurately measured by Wm. Forsyth, the surveyor of said District, as appears by his affidavit, marked Exhibit "A."

Answer of Albert Gleason—Continued.

Answer of Geo. W. Linville—Continued.

12. The twelfth paragraph charges that for the causes set forth and divers other causes, inaccuracies, and irregularities, the said assessment is *wholly illegal and unjust;* and that it has been *fraudulently* levied with purpose and intent to defraud complainants.

12. They deny that there are inaccuracies in said assessments, or that they are illegal or unjust, in whole or in part; and they deny that they were fraudulently levied with intent to defraud or injure complainants, but they say they have been legally and fairly made, and that the property of com-

12. He has no knowledge of the matters contained in the twelfth paragraph of said bill, and neither admits nor denies them.

12. Of the allegations of this paragraph he has no knowledge, and does not admit or deny them.

The Original Bill—Continued.

13. The thirteenth paragraph charges that the members of the Board of Public Works, combining and confederating with Linville and Gleason to defraud the complainants and the people of the District of Columbia, have permitted and authorized them to do the work in an *imperfect manner*, and in violation of said contract, and to impose said unlawful assessment upon complainants, and to convert the proceeds thereof to their own private use; and that the defendants have converted the materials, curbing, bricks, &c., to their own use and profit.

Answer of the Board of Public Works—Continued.

plainants has been benefited to the full amount charged against it.

13. On *personal knowledge*, individually and collectively, they *deny all combination and confederation* with Linville and Gleason *to defraud* the complainants and the people of the District, and they deny that they permitted them to do said work in an imperfect manner in violation of any contract, and to impose unlawful assessments upon complainants, and to convert the proceeds thereof to their own use. They deny that they have converted any of the material to their own use, or taken them away from said street, and that all *such charges are without foundation and purely malignant.*

They deny all allegations of the bill not hereinbefore admitted or denied.

Answer of Albert Gleason—Continued.

13. On his personal knowledge, he denies that they combined and confederated with Linville, the District, or the Board of Public Works, collectively or individually, to defraud the complainants, or any of them, or the people of said District; and he denies that the members of said Board permitted him, personally or in connection with Linville, to do so, or to do the work on said street in an imperfect manner, or in violation of the contract, or for private gain, or to convert the proceeds of said work to their own use. And he says that all work done by him was well and properly done, as fully as could be done, in the latter part of the year 1871, and if any repairs are required they are only incidental to work of that nature. He says the prices received for said work were low, and less than received during the same season for similar work done for the city of Washington, and that on the whole work he lost a considerable sum, on account of the lowness of prices.

And he says, from his own knowledge, that in order to properly sewer and drain said Seventh street it was necessary to increase the dimensions of the sewer originally projected and contracted therefor, and that it was necessary to extend the sewer about a square along Water street, to obtain a proper outlet to the Potomac river.

And during the work done by him no complaint was made to him, or to any one, to his knowledge, by the property-holders along said street, in

Answer of Geo. W. Linville—Continued.

13. On his personal knowledge he denies that he combined and confederated with Gleason, the District, or the Board of Public Works, individually or collectively, to defraud the complainants, or any of them; and he denies that the members of the Board have permitted him personally, or in connection with Gleason, to do so, or to do said work, or any part thereof, in an improper manner, or in violation of any contract, or to convert the proceeds of said work to his or their private use. He denies that he has converted any of the old material to his use, and he believes that none of the defendants have done so.

relation to the character of the work or manner in which it was being done.

14. In further denial, and that the court may know all the facts, they say that all they did was for the interests of the property of the complainants and the welfare of the public; that no private purpose or gain controlled them in any respect; that said work was publicly commenced and prosecuted for six months by able and experienced workmen; that it was done in the neighborhood of the residences of some of complainants, and under their daily observation, and with the full knowledge of all of them, and with the Board of easy access and always ready and willing to receive suggestions or information in relation to said work; that during all this time none of the complainants complained to said Board of the plan of the work, or of the modifications in or additions to the contract of the late corporation of the city of Washington, or of the manner of the execution of said work; that, on the contrary, complainants acquiesced therein; that the work was completed in December, 1871, and it was not until they were assessed and regularly notified that they made any complaint; and they submit that after such acquiescence and laches it would be inequitable to allow them to attain the purposes of their said bill, and take the advantage of said work without paying their proportionate share thereof.

15. They say the total cost of said work is $157,583.34, leaving, after

The Original Bill—Continued.

The prayer of the bill is:

1. That the District of Columbia, said Cooke, Shepherd, Magruder, Mullett, and Brown, constituting the Board of Public Works, Linville, and Gleason, may be made defendants, and served with process.

2. That the District and Board may be enjoined from issuing certificates of indebtedness against the property of complainants on account of said assessment.

3. That a temporary injunction to the same effect issue against the District and Board, their agents, &c.

4. That said assessment on property of complainants be decreed null and void, and of no validity to charge said property with a lien.

5. That Linville and Gleason be enjoined from receiving, and the District and Board from making, any payment on account of said work.

Answer of the Board of Public Works—Continued.

deducting $24,914.79 charged to the United States, the Washington and Georgetown Railroad Company, and other items, the total cost, $140,547.71, one-third of which, $46,849.27, *only* is charged or assessed against private property adjoining and especially benefited by said improvements, and $20,109.30 against the separate property of complainants named in the bill, and the balance, $26,739.93, against the other property adjoining and especially benefited thereby, of which $1,424.02 has been paid.

It is prayed that the bill be dismissed, with costs, &c.

Answer of Albert Gleason—Continued.

Answer of Geo. W. Linville—Continued.

The Original Bill—Continued.

6. That the cause be referred to the auditor of the court to state a proper account of said work, to inquire into the manner in which the same has been done, and take testimony in relation to the items.

7. Prayer for general relief.

Answer of the Board of Public Works—Continued.

Answer of the District of Columbia.

It denies that complainants have been assessed for the work mentioned in the bill, or any other work or improvements whatever, by it, as alleged in the 4th paragraph of the bill, or otherwise; or that complainants have been notified by it that unless said assessments are paid, certificates of indebtedness will be issued by the Board of Public Works.

Defendant denies each and every allegation of the bill which charges that old material of any kind was moved or taken away by this defendant or its agents or employés, and denies that any material was converted by this defendant or its agents to its own use.

It answers that it has no interest in this suit in the matter of the assessments on complainants' property, or in the certificates to be issued, and that it is improperly made a party defendant in this suit, and prays to have the same benefit thereof as if it had formally demurred to the bill for such reason.

Answer of Albert Gleason—Continued.

Answer of Geo. W. Linville—Continued.

Amended Bill.

The amended bill is identical with the original bill, except the following paragraphs, viz: 9*a*, 9*b*, 9*c*, 13, 14, 15, 16, and 17, which are in substance as follows:

9*a*. Alleges that in making the assessment the Board proceeded apparently within the scope of its powers, and its proceeding upon its face is valid; that said assessments and certificates when issued will be a valid lien on complainants' real estate; that notwithstanding such apparent validity said proceedings were wholly void by reason of divers matters which can only be established by extrinsic evidence; that defendant derived its power to make such assessment solely from under the ordinances of the city of Washington of May 9, June 30, 1871, and March 28, 1871; that although those ordinances fixed the location and dimensions of said sewer, defendant, without authority, enlarged the distance between the termini of the sewer, and increased the dimensions; that part of said sewer is entirely beyond the line of Seventh street west; that no necessity existed for so increasing the length and size of the sewer, or of extending it in or along Water street; that it would have been sufficiently constructed in accordance with said ordinances, and a large sum of money thereby saved; that said proceedings and assessment, though *prima facie* valid, are actually void for the following reasons, which can only be established by extrinsic evidence, viz:

A charge of $577 for superintendence of said work, contrary to said ordinance of May 9, 1870; that the

Answer of the Board of Public Works to the Amended Bill.

The answer is the same as the answer to the original bill, except the answer to paragraphs 9*a*, 9*b*, 9*c*, 13, 14, 15, 16, 17, which is in substance as follows:

9*a*. They deny that they derived their power to make said improvements from the ordinances of the city of Washington, but that such power was derived from act of Congress of the 21st day of February, 1871, and the District acts of Assembly of July 10, 1871, August 10 and 11, 1871, and they assumed and took control of said improvements by virtue of their appointment under said act of Congress; that the contract made with the city of Washington was made on the 30th day of March, 1871, after they had entered upon the duties of their office; and the changes made in said contract were made after their appointment and qualification, and as such Board, and they deny that such changes were in derogation of any authority binding on them; they deny that they greatly altered the distance between the termini of said sewer, or its dimensions; they deny that said sewer, as provided for by the contract of March 30, 1871, was adequate, and say that the changes were found to be necessary and proper to be made; they deny that said sewer, six feet in diameter, is entirely beyond the line of Seventh street, and is constructed and runs wholly in Water street; they say it is connected with the sewer on the line of Seventh street, and passes from that to the river, and affords a direct outlet for said sewer from said Seventh street to the river.

Amended Bill—
Continued.

sum of $ was illegally expended in construction of the sewer in Water street, extending about 640 feet beyond the line of Seventh street west, and not adjacent to the property on said street, the said sum of $ being the difference between the cost of constructing said sewer as provided by said ordinance of March 28, 1871, and the cost of constructing the same as it was actually done; that there were 183 square yards of Scharf pavement laid on Water street, wholly beyond the line of Seventh street west, and complainants illegally assessed a portion of the sum of $256.20 therefor; that they are illegally assessed with a portion of $133.10, the cost of 6,243 square yards of new cobble-stones; that they are illegally assessed with a portion of $217.68, the cost of 2,478 square feet of flagging, and $66.12 for 26½ feet of curb and setting; that they are improperly assessed with a portion of $7,356.03, illegally paid Albert Gleason for work; that they are illegally assessed with a portion of $16,521.04, the cost of man-holes, traps, drops, and lateral branches, expressly exempted as a charge on private property by ordinance of May 9, 1870; that a portion of the cost of said improvements in front of church and school property is charged in said assessment; that the charge of $7,879.16, 5 per cent. of the gross cost of said work, is illegal. And they say for these reasons they have no remedy save in equity.

9*b*. In order to show to what amount they were liable to be assessed for

Answer of the Board of Public Works to the Amended Bill—
Continued.

They deny that, in making said assessments, they proceeded only apparently within the scope of their authority, and that said assessments are only valid on their face; and they say that in making the same they acted within the letter and intention of the said act of Congress of February 21, 1871; and said assessment is based on a statement of the costs of said improvement on file in their office, a copy of which is filed as Exhibit B; that the assessment and certificates, when issued, will be a lien upon the real estate of complainants within the meaning and intent of said law.

They deny that said assessments are void for reasons not appearing on the face of the proceedings, and that can only be established by extrinsic evidence; of their own personal knowledge, all the facts and proceedings in connection with said assessments appear of record in their office, as respects both items and aggregates; that Exhibit "B" itself shows the particulars and totals of the cost of said improvements, and that no extrinsic evidence can add to or alter the facts and figures of said statement and other records on file in their office. And they deny that any of the particulars alleged to require extrinsic evidence do require the same, as will appear by reference thereto.

9*b*. They deny that Exhibit No. "5" with the amended bill correctly

Amended Bill—
Continued.

said work they refer to the contract of the city of Washington with Linville, and pray to refer to a statement of expenditure on the basis of that contract, filed herewith as complainants' exhibit No. 5.

9c. Charges that said certificates of indebtedness are designed to operate as a lien upon the real estate mentioned in said bill, and will prevent the transfer thereof by complainants, and after the expiration of one year will subject their real estate to sale therefor.

13. Charges that the District and Board of Public Works have expended the money heretofore appropriated for special improvements, and at present are insolvent and unable to refund any sum which they might over pay.

14. That they are informed that the sum of 190 odd thousand dollars here-

Answer of the Board of Public Works to the Amended Bill—
Continued.

sets forth the amount for which complainants would have been justly liable for said improvements made under the contract with the city of Washington, and they say they would have been liable for a much larger amount than therein set forth.

9c. They deny that said certificates of indebtedness are designed to operate as a lien upon the property of complainants; they say that by the act of Assembly the said certificates and assessments will be a lien until paid; they deny the issuing of said certificates will interfere with the transfer by complainants of their said property, and that the same will subject the property to sale after the expiration of one year, but that said property will only be sold on the refusal to pay said certificates within one year; they deny that complainants are wholly remediless at law, and can find relief only in equity; and they say that if any wrong has been done in the mode making said assessments, or otherwise, complainants have different and ample remedies at law.

13. They deny that the District of Columbia and the Board of Public Works are insolvent, and would be unable to refund to complainants any sum which they might pay on said assessments which should be found not due from them on final hearing.

14. This paragraph is demurred to.

Amended Bill—
Continued.

tofore appropriated by Congress to pay for improvements adjacent to Government property has been exhausted in paying for improvements of other property than that on Seventh street, and that no part of said sum is now available to pay for the improvement adjacent to Government property on Seventh street; and they require defendants to disclose how much of said sum has been drawn and expended; for what purpose used; on what particular work, and adjacent to what public property; and when such disbursements were made.

15. That they believe the Board, or the persons composing the same, intend to collect said assessment and have required the same to be paid at the office of defendants, and design to take the proceeds into their own custody; that it has appointed one of its members as treasurer to hold and disburse said fund, contrary to the statutes of the United States and said District, and they require said defendants to discover whether they have not directed said money to be paid some officer of said Board, and whether they have not appointed a treasurer from their own number, and what duties they have imposed on said treasurer, and whether it is not their intention to collect said money directly without the intervention of any other District officer; and also what officer there is at the office of said Board to receive said money.

Answer of the Board of Public Works to the Amended Bill—
Continued.

15. This paragraph of the bill rests only on information and belief; they admit that it is their intention to collect said assessments and have the same paid at their office, and that the Legislative Assembly constituted said Board collector of the same, as will appear by reference to the act of August 23, 1871.

They deny that it is their design to take the proceeds into their own control and custody, but the same as collected will be placed in the hands of the treasurer of the District; and that if any necessity existed for the action of the court in relation thereto, it has been fully done by the order made in this cause on the 25th day of September, 1872. They deny that they have appointed one of their own number as a treasurer to receive and disburse said funds, or that they are evading the law in the premises.

George W. Beall is the person designated by the Board to receive payment of said special assessments.

Amended Bill—
Continued.

16. That they are informed that the sewer for which in part said assessment is made runs along Water street and across M and L, a distance from Seventh street of 640 feet, and that the construction of the part of the sewer in Water street is more expensive, in proportion, than any other. And they require said defendants to discover what distance said sewer runs from the termination of said Seventh street to the mouth of said sewer, and what was the cost of building that part of the sewer. Also, what other sewer discharges into the Seventh street sewer, and where said connecting sewer runs, and the length thereof.

17. Complainants also require defendants to discover what the sum of $7,879.16 was assessed for; for what the same was paid, if paid, and if due, what it is due for; and also whether it is due or paid; and also to state whether the statement published and signed "Alex. Shepherd, Vice-President," and made an exhibit to the bill, marked "No. 4," is true and correct, and embraces all the items of account making up the aggregate of said work, and if not, what has been omitted therefrom.

Answer of the Board of Public Works to the Amended Bill—
Continued.

16. They admit the general correctness of this paragraph of the bill as to the course and extent of the part of the sewer referred to. They say complainants are not entitled to the discovery they seek therein, but say, nevertheless, that the distance of the sewer from the river to L street, or which is called by some the end of Seventh street, is 680 feet and 8 inches, and that the cost thereof was $7,823.00.

17. They say that the manner in which the demand for discovery is made in relation to the items of general expenses, viz., $7,879.16, nor the character of the matter itself, entitles the complainants to the information sought. And they say this constituted part of the original bill, and was answered, and will appear by reference thereto. And they further say that this, besides necessary engineering, includes necessary clerical hire, incidental labor necessary and proper to carry on the work with which they were charged by law, and is a necessary and inseparable cost of said work. And no unnecessary or useless cost or expense was included in the said 5 per cent., but only such as was found essential and proper to the work, and such as is customary in all work of the kind, and gives the names of clerks employed.

Amended Bill—
Continued.

Answer of the Board of Public Works to the Amended Bill—
Continued.

18. They say that the matter of the amended bill consists almost wholly of the matter of the original bill, expressed in the modified and enlarged form; and while they have answered, they have done so for the purpose of having the case heard as speedily as possible, and waive no right by so doing, and the court should take the proper action in relation thereto.

19. They deny any and all the allegations of the bill not hereinbefore denied, admitted, or demurred to.

The prayer of the amended bill is in substance the same as the prayer of the original bill.

Answer of the District of Columbia to the Amended Bill.

9*a*, *b*, *c*. This part of the amendment contains no new matter; is only an expansion of the original bill, and is improper, and has been sufficiently answered.

13. Denies that the District of Columbia is insolvent, and the averment that the money for special improvements has been expended is immaterial.

14. Matters contained in this paragraph are irrelevant.

15. The matters of this paragraph relate principally to the Board of Public Works, and require no answer from the District of Columbia.

Amended Bill—
Continued.

Answer of the District of Columbia to the Amended Bill—
Continued.

16. What is said of fifteenth paragraph is true of this.

17. Same.

18. Denies that any matter in amended bill relating to this defendant not hereinbefore referred to is true; that all the matters of amended bill may be tried at law, and asks to have same benefit as if it had demurred to bill.

Supplemental Bill.

States the filing of the original and amended bills and what the prayers thereof are, and that the cause is ready for hearing; that since the filing of the bill the wooden carriage-way on Seventh street, constituting a part of the special improvements, by reason of the imperfect manner of its construction and infirm character of its foundation, has proved greatly defective, and has necessitated costly repairs and is now needing repairs; that the sewer has proved insufficient and has been the occasion of great loss and damage to complainants' property; that since the filing of the original bill the Board has issued certificates of indebtedness against the property of complainants, in denominations respectively corresponding to the amount of the assessment against each lot, bearing interest at 10 per centum per annum until paid, and declared to be a lien on their property by act of Assembly of the District approved August 10th, 1871, filed as Exhibit No. 6; that afterwards, on the 29th day of May, 1873, the Assembly of the District passed another act extending the time for payment of assessments for special improvements, and by the third section thereof makes such certificates payable in five annual instalments, and the act is filed as Exhibit No. "7;" that afterwards, on the 11th day of September, 1873, the complainants, believing that said act applied to the assessments against them, did by their counsel and in writing, under protest, make lawful tender of the one-fifth annual instalment, now claimed to be due, to the said Board, through one G. W. Beall, its assessor

Answer of the Board of Public Works to the Supplemental Bill.

1. That the statements in relation to the character of the work are untrue; that this part of the supplemental bill is a repetition of original bill, and improper; admits that certificates of indebtedness have been issued against complainants' property since filing the original bill, and says that they were issued in accordance with the provisions of the act of Assembly of the District, approved August 10, 1871, and agreeably to the act of Congress of the 21st of February, 1871, and long prior to the 29th day of May, 1873, and long before the last-mentioned day, said certificates, *for a full and valuable consideration received by the District and Board, passed into the possession of the First National Bank of New York, and before said day, and at the time of filing said bill, were in the possession of said bank as bona fide holders thereof*, and the Board are required to sell sufficient of said real estate to pay them, after advertising for three weeks as required by law, if such certificates remain unpaid for one year after their issuance, and the holders thereof demanded a sale. Admits the passage of the act of May 29, 1873, but denies that section three thereof applies to these certificates, as they had been issued and were in the hands of *bona fide* holders for value before the passage of said act.

They say that section 4 of said act relates to these and similar certificates, and expressly provides that certificates which have been issued before its passage, and not paid within one year, shall, on request of the holders, be purchased by the commissioners of the sinking fund, and held and

Supplemental Bill—
Continued.

and collector, and a copy of said tender and protest is filed as "Exhibit No. 8;" that said Board, through Beall, refused to accept the same, and claims that the whole assessment is due; and complainants, protesting that nothing is due from them, offer to pay the one-fifth into court at any time when required by the court; that the Board claims said act does not apply, and illegally demands the payment of the whole certificates, and has notified complainants if same are not paid before 15th September, 1873, their respective lots will be sold for payment thereof. One notice filed as "Exhibit No. 9."

Prayer

Is that defendants may answer the bill and supplemental bill; that Board of Public Works may be enjoined from making any sale, or advertising the same, and for general relief.

Answer of the Board of Public Works to the Supplemental Bill—
Continued.

collected on their account as provided in sections 2 and 3; but this *can only be done by consent* and at the request of the holders of the over-due certificates; and they say no such request has been made by the holders of the certificates mentioned in the supplemental bill; that without such request they must be collected as provided by the act of 10th of August, 1871.

They admit that complainants' counsel left with Beall the written protest and professed tender, but deny that any money was tendered him, or that any legal tender whatever was made to the Board or District. They admit that they refuse and still refuse to accept the payment of one-fifth, and say they have no legal right to receive the same; they deny that their demand of payment in full is illegal or in derogation of any right of complainants. They admit the service of notice on complainants as set forth in the supplemental bill. For fuller answer they refer to their answers to original bill, and exhibits filed therewith. They say that all the matters contained in the bill can be tried at law, and complainants have no right to come into a court of equity therefor. That the supplemental bill relates to different matters than the original bill, and should be presented, if at all, by an original bill.

Supplemental Bill—
Continued.

Answer of the District of Columbia to the Supplemental Bill.

That the allegations in relation to the character of the work are untrue; that it is a reiteration of the original bill, and improper. It denies that the correct construction of the act of May 29, 1873, is presented in the bill. A copy of the law is annexed to the answer and made part thereof. It has no interest in this suit, and is improperly made a party defendant to the supplemental bill. Complainants are also improperly joined, and have no joint interest in the subject-matter of the suit. All the matters are cognizable by a court of law, and not properly brought into a court of equity.

Supplemental Bill—
Continued.

The Answer of the First National Bank of New York to the Supplemental Bill.

1. That it is a corporation organized under the act of Congress of February 25, 1869, entitled "An act to provide a National Currency," &c.

2. That *before* the passage by the Assembly of the District of Columbia of the said act of May 26, 1873, the bank, in the *regular course of business, purchased for a valuable consideration a large number of the certificates* issued by the Board of Public Works of said District against the property mentioned in "Exhibit No. 1," with complainants' original bill, and is now the lawful owner and holder of the same, and was such long before the passage of the said act of May 26, 1873, and said certificates have not, nor has any part thereof, been paid to said bank.

3. It has no knowledge of the various allegations of the supplemental bill, and neither admits nor denies the same, but insists upon strict proof thereof.

4. It is advised and believes that the complainants ought not to maintain their suit, because of *a misjoinder of parties plaintiff therein*, and prays it may have the same advantage of that error as if it had *demurred* on that ground.

5. It is advised and believes that the Legislative Assembly of the District of Columbia had no power to enact a law extending or changing in any way the time of payment fixed in and by the terms of said certificates *after* they had passed into the hands of third parties for a valuable consideration.

In the brief of the pleadings, the amended bill and the answers to it are stated; but it is respectfully submitted that they are, properly, no part of the case. On the 9th day of November, 1872, the counsel for complainants came into open court and asked leave to withdraw and dismiss the rule to show cause for an injunction, and to dismiss the motion for an injunction on the amended bill; and on consideration it was ordered by the court that said rule be discharged, and the motion dismissed, and an injunction on the amended bill denied. (See p. 59, printed record.) It is submitted that this was an abandonment and dismissal of the amended bill. It has been so treated by the complainants' counsel in the subsequent proceedings in the cause, viz: On the 29th day of November, 1872, the complainants joined issue with the defendants, and had the cause set for hearing on the "bill, answer, and testimony against the defendants." (See printed record, p. 59.) After the filing of the supplemental bill, the complainants' counsel joined issue with the defendants, "the Board of Public Works and the First National Bank," and had the cause set for hearing "on original and supplemental bills, the answers, and testimony." And on that hearing the decree was pronounced, from which complainants appeal.

General Questions.

1. Can the bill be sustained, filed as it is by separate owners of different lots on account of distinct assessments in which there is no common interest?—or, in other words, is there not a misjoinder of complainants?

2. If the parties are properly united, is an injunction a proper remedy?

3. If the complainants had, at any time, an equitable remedy, was it not lost by acquiescence and delay?

4. Did the Board of Public Works, in *making* the im-

provements on Seventh street, in any respect, act illegally?

5. Were the assessments made and the certificates issued without authority of law?

6. If the Board of Public Works had power to make assessments and to issue certificates, would equity interfere with the exercise of its judgment and discretion?

7. Have not the acts and proceedings of the Board of Public Works been ratified by Congress and the Legislative Assembly?

8. Can the First National Bank of New York, to which the certificates were transferred in good faith and for value, be affected by any of the alleged equities of the complainants?

These questions will be briefly considered in their order.

First.

PARTIES.

From the bill (Transcript of record, page 1, § 3, and exhibit No. 1, p. 6) it appears that the plaintiffs were *separate* owners of different lots in different squares, and containing different numbers of square feet, and that the assessments corresponded with these differences, ranging from $6.39 to $1,138.18 against single lots. The complainants were neither joint-tenants or tenants-in-common. Each was the owner of distinct lots, of different value and dimensions, and many of them distant from each other. None of them had a common pecuniary interest, but only an interest in the questions involved. This is insufficient to justify them in uniting as complainants in a bill. On this point a few authorities may be cited.

And first, a reference may be made to Story's Equity Pleadings.

"§ 279. All the foregoing are cases, where the objection

" of multifariousness arises on account of various defendants
" being improperly joined in a suit upon distinct and inde-
" pendent matters. But the like principle equally applies to
" an improper joinder of plaintiffs, who claim no common in-
" terest, but assert *distinct and several* claims against one
" and the same defendant. Thus, for example, if two plain-
" tiffs should, in one bill, bring a joint demand, and a several
" demand, against the same defendant, it would be demurra-
" ble on the ground of multifariousness. So, if two plain-
" tiffs, claiming under distinct promissory notes given to
" them severally, should file a joint bill on account thereof.
" So, if two plaintiffs, who had given distinct and several
" promissory notes to the defendants, should file a joint bill
" to recover back money paid by them severally to the de-
" fendants on those notes, it would be demurrable; for the
" several contracts have no connection with each other. So,
" if A, B, and C, being the next of kin, and D, being the sole
" heir-at-law, should unite in one suit against an adminis-
" trator for an account of the personal and real estate of the
" intestate, the bill would be multifarious; for the claims of
" the next of kin to an account of the personal estate are
" wholly distinct from those of the heir to the real estate.
" So, if several distinct holders of scrip or shares in a loan
" should sue on behalf of themselves and all others, to have
" their subscriptions refunded, the bill would be multifarious;
" for their interests and demands are distinct and several.
" [So, in a bill by five several occupiers of houses in a town,
" to restrain the erection of a steam-engine, which would be
" a nuisance to each of them, they cannot sue as co-plaintiffs,
" for each has a distinct right."]

Story's Equity Pleadings, pp. 272, 273, 274.

The case of *Cutting et al.* vs. *Gilbert* was a bill in equity, filed by some six firms of the city of New York, licensed and doing business as bankers and brokers under the internal revenue act of June 30th, 1864, as amended by the act of March 3d, 1865, against Sylvester P. Gilbert, assessor, and Sheridan Shook, collector of the 32d collection district, in said city, as well for themselves as all others in the same

interest, and who should come in and be made parties thereto, and contribute to the expenses of the proceedings. The bill, after setting forth the facts which raised the question whether or not brokers, and bankers doing business as brokers, who had bought and sold stocks, bonds, and other securities mentioned in section 99 of the act of 1864, on their own account and for themselves, and not for others or on commission, were properly chargeable with the tax prescribed in that section, prayed that it might be adjudged that they were not, and that the defendants might be enjoined from assessing or collecting the tax.

To this bill a demurrer was filed. Mr. Justice Nelson, delivering the opinion of the court, says:

"This is a bill of peace, to quiet the rights of parties, and "to put an end to further litigation. The bill is founded on "the idea that all persons in business as brokers, or who are "bankers doing business as brokers, charged with the tax in "question, have such a unity or joinder of interest in contesting it, that all may join in the bill for that purpose; and "that as the parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear "in the name of themselves *and for the rest.* I have not "been able to concur in this view. The interest that will "allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not "only an interest in the question, but one in common in the "subject-matter of the suit," etc.

"In the case before me, the only matter in *common* among "the plaintiffs, or between them and the defendants, is an "interest in the *question* involved, which *alone* cannot lay a "foundation for the *joinder* of parties. There is scarcely a "suit at law, or in equity, which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question "in which other parties are interested, as for instance, the "doctrine of trusts, and the statutes of descents, of frauds, of "wills, and the like; yet no lawyer would contend that such "an interest would justify a joinder of parties as plaintiffs, "in a case arising under the law of trusts, or under any of

" the statutes mentioned. The same may be said of ques-
" tions arising under the revenue laws, such as the tariff and
" the excise laws, and which are the subject of litigation in
" the courts almost daily. Large classes of persons other
" than the parties to the suit, are interested in the questions
" involved and determined. To allow them to be made par-
" ties to the suit would confound the established order of ju-
" dicial proceedings, and lead to endless perplexity and con-
" fusion."

The learned judge, further along in the opinion, speaking of the misjoinder of parties, says: "I am entirely satisfied " that it is without precedent or principle."

6 Blatchford's C. C., 259.

Dodd *et al. vs.* The City of Hartford was an application to the court, as a court of chancery, to restrain the defendants from enforcing the collection of certain assessments for the expenses of a sewer. The petitioner complains that these assessments and the warrants issued for their collection are illegal and void, and that the petitioners and other persons, to the number of three hundred and upwards, will be compelled to commence separate suits for the damages they will suffer if the warrants are executed, and that thus the peace of the community will be disturbed, and expense and vexation will ensue unless the injunction be granted to restrain the city from collecting the assessments.

The defendants demurred to the petition, and the questions arising upon the demurrer were reserved for the advice of the Supreme Court. Seymour, J., says:

" We are of the opinion that the court has no jurisdiction
" to interpose by way of injunction, as prayed for. No prop-
" erty, right, or franchise held by the petitioner in common
" is claimed to be affected by the proceedings of the suit.
" The assessments are against the petitioners severally, not

" against them jointly. If the warrants are collected, and " any of these parties have occasion to bring suits at law, " their suits must be several and separate. They certainly " cannot join in an action at law against the city or against " the collector.

" In respect to each of these petitioners taking his case " separately, it is difficult to see why he has not an adequate " remedy at law. There is no averment that the real estate " of any of these parties has been or can be levied upon. " The warrant authorizes the taking of personal estate only.

" No irreparable injury can arise from the levy. If the " proceedings of the common council are irregular and void, " as the petitioners claim they are, an action at law will lie " to recover all the damages which shall be sustained by the " levy. The question of the illegality of the assessment will " then be tried in its appropriate form of law.

" The claim most pressed by the petitioners is that the court " ought to entertain jurisdiction in order to prevent a multi- " plicity of suits, but no one of these petitioners has any in- " terest in the suit which another of them may be called upon " to institute. They cannot individually complain that others " are compelled to sue, for they have no share in the expense " or vexation of each other's suits.

" The multiplicity of suits which the petition seeks to avoid " does not affect injuriously any one of the petitioners. No " one of them has occasion to expect any such multiplicity " affecting himself. One suit is all that any one of them has to " fear, and the object of this bill would seem to be to relieve " these parties severally from that one suit, and to consoli- " date the apprehended litigation. In other words, to enforce " a consolidation rule by means of the extraordinary powers " of a court of chancery. If the assessments were against " one person only, it is not claimed that he could transfer " from a court of law to a court of equity the question of his " liability. But how is the condition of any of these peti- " tioners worse because others are assessed for the same im- " provement?

" It would undoubtedly be convenient to try the questions " relative to these warrants in one comprehensive law-suit. " But it does not seem to the court that the case presented " by the bill is one of such irreparable injury, or inadequate " relief at law, as to warrant us in taking it away from the " legal tribunal.

"There are also reasons of policy, founded on the neces-
" sity of speedy collection of taxes, which ought to prevent
" a court of chancery from suspending these proceedings, ex-
" cept upon the clearest grounds. We therefore advise the
" superior court that the demurrer is well taken, and *that the*
" *petition be dismissed.*"

25 Conn., 232.

Newcomb vs. *Horton*. In this case the complainant sued on behalf of himself and all other tax-payers of a certain school district, to enjoin the collector from proceeding to sell certain real estate for payment of delinquent taxes, which had been assessed to pay certain judgments mentioned in the petition, on the ground that the judgments had been rendered on forged and fraudulent school orders, and that the director of the district had colluded with the parties to whom such orders were given, and fraudulently failed to make defence to the suits at law. The complaint was demurred to on the ground that complainant could not sue on behalf of himself and the other tax-payers of the district. The demurrer was sustained and bill dismissed. The opinion of the court is very able and clear, and directly in point. Cob, J., says:

"The first objection is, in substance, that the respondent
" could not bring this action in his own behalf and on behalf
" of the several tax-payers of the school district; that there
" is no common right or general interest of these persons in
" the property affected by the tax; that the tax is upon and
" against the individual property of each tax-payer; and that
" if there is any injury, it is an injury to the property and
" rights of each tax-payer alone, and not an injury affecting a
" common right or interest. It appears to us that this ob-
" jection must prevail.

"It is an elementary rule in chancery pleading, that every
" person who is at all interested in the event of a suit, or
" necessary to the relief, must be made a party in order to
" enable the court to settle the rights of all and make a

" complete and final decree upon the merits. This rule was " dispensed with where it was inconvenient, difficult or im- " practicable, on account of the number or situation of the " parties, to unite them in one suit. In that case the court " went as far as it could in doing justice to the parties before " it, rather than deny it altogether. (Story's Eq. Plead., " chap. 4; Lube's Eq. Plead., chap. 3; and Mitford's Plead., " 164.) Sometimes, where the question was one of a common " or general interest, in order to prevent a multiplicity of " suits, one or more was permitted to sue or defend for the " benefit of the whole. Illustrations of this rule are given " by Judge Story, in sections 97, 98, 107, 124, 168, and 285 " of his work above cited.

" There is no general or common interest affected by the " assessment and tax in this case. The property is owned in " severalty, and each tax-payer may sue alone, and obtain " complete relief so far as his rights and property are con- " cerned. There is no necessity for one tax-payer to unite " another with him in a suit for this purpose. The county " treasurer may be restrained from advertising and selling " A's land, and proceed and sell all the rest. It is true, sell- " ing lands for an illegal and void tax would be an act inju- " rious to all persons whose property was sold. But that " does not prove that one tax-payer may bring this suit for " his own benefit as well as in behalf of others. Suppose " the town treasurer had levied upon and sold the personal " property of each tax-payer, and thus collected the amount " of tax assessed against each. Would it be claimed that all " whose property had been thus illegally sold could main- " tain a joint action of trespass? Probably not. It would " be admitted that there was no joint and common interest in " the property, and that each one had his separate trespass to " complain of. So here. The rights are separate, the inter- " ests entirely distinct; and one tax-payer may obtain com- " plete relief without making another a party. In *Bouton* " vs *The City of Brooklyn et al.*, 15 Barb. (S. C.,) 375, it " was distinctly ruled that an action brought by a party suing " in his own behalf as well as in behalf of other persons in- " terested, to avoid an assessment made by a municipal cor- " poration upon the separate lots of the plaintiff and such " other persons, for grading a park, and to restrain the col- " lector from collecting the same, could not be maintained. " It appears to us that this decision rests upon sound princi-

" ciples, and that the first ground of demurrer taken to the " complaint is good. This likewise disposes of the second " cause of demurrer."

After disposing of some other questions, the court says:

" But for the reason first given, the order of the circuit " court overruling the demurrer to the complaint must be re- " versed."

18 Wis., 568, 569, 570.

Barnes et al. vs. *The City of Beloit et al.* This was an application by complainants, suing on behalf of themselves and all others similarly situated, to enjoin the sale of certain lots in the city by the treasurer thereof, to pay certain assessments against said lots, alleged to have been illegally made for the widening of Tight street. It appeared that the plaintiffs each owned, separately, one or more lots, and had no common interest in any one lot. There was a demurrer for misjoinder and multifariousness, which was sustained and the bill dismissed. This case is also directly in point. The opinion of the court was delivered by Downer, J. He says:

" The complaint does not state facts sufficient to authorize " the plaintiffs to bring the suit on behalf of themselves as " well as others. (*Newcomb* vs. *Horton, et al.*, 18 Wis., 566.) " If the proceedings set out in the complaint are valid, then " there is a lien on each lot separately to the amount of the " benefits assessed against it for widening Tight street; if " they are not legal, then there may be an apparent cloud to " the amount so assessed on each lot. Each plaintiff is in- " terested only in removing this cloud from his own lots, not " from the lots belonging respectively to his co-plaintiffs. " Each and all may be interested in the question; for if one " has a right to the aid of a court of equity to remove the " cloud or enjoin the assessment as illegal, for the same rea- " sons and on the same evidence each of the others might ob- " tain relief. But there is no such common pecuniary interest

" as authorizes them to unite in one suit as plaintiffs to ob-
" tain the relief asked. Each can sue alone, and the others
" are not necessary parties. This is not an action respecting
" a common fund, nor to assert a common right, nor to re-
" strain acts injurious to property in which all the plaintiffs
" have a *common* interest or a common right. But the com-
" plaint in the action sets forth separate causes of action, one
" in favor of each plaintiff, without being separately stated;
" and if so, several causes of action are improperly united."
19 Wis., 94, 95.

Marselis et al. vs. *Morris Canal and Banking Co.* Complainants filed a bill in behalf of themselves and others, alleging that the defendant had entered on their land and excavated the earth for a canal, without authority of law and without purchasing the same, &c., and prayed that the company be restrained from further using the same. It appeared that the complainants, and others in whose behalf the suit was brought, were separate owners of distinct parcels of land along the line of the canal. There was a demurrer for multifariousness. This was the only point discussed or decided in the case. It was held that the bill was multifarious, and it was dismissed. The reasoning of the Chancellor in his opinion seems to be conclusive of the question:

" The matter comes before the court on an application for
" an injunction. A number of objections have been urged
" against the bill in the shape in which it is presented before
" the court. And among others, it is objected, that this is not
" one of the cases in which the complainants may lawfully join
" in the prosecution of the suit. That their interests, instead
" of being joint or common, are separate, independent, and
" distinct; and being blended together, the bill is multifari-
" ous and therefore bad. This is the first point I propose to
" consider. The question who are and who are not necessary
" or proper parties to a bill in equity, and what rights may
" be brought together in one suit, is one that sometimes oc-

" casions perplexity. While care must be taken on the one " hand, to bring all proper parties before the court, the same " care should be taken on the other, that none are brought " there whose rights are not to be in some way bound by the " decree that may be made. So too, while the court will, for " the sake of avoiding a multiplicity of actions, take cogni- " zance of suits in which many rights, having reference to " one subject-matter, are united; it must be careful not to " admit several plaintiffs to demand by one bill, several " matters perfectly distinct and unconnected.

" The rules of pleading in a court of equity, are not so " technical and precise as in the courts of law. The general " powers of this court, and its peculiar modes of administer- " ing relief, authorize and require a greater degree of liberal- " ity than would be expedient in the courts of common law. " Still, when principles have by repeated adjudications become " settled, and especially when they are founded in justice and " the fitness of things, it is quite as important that those prin- " ciples should be preserved in this as in any other court.

" To ascertain and apply the correct rule to this case, it is " necessary to see precisely what the case is. The complain- " ants complain of an injury which they have sustained by " the acts of the defendant, in excavating their canal through " the lands of complainants. They are *several* owners, having " *distinct* rights in the several tracts of land through which " the canal passes. The injuries sustained by one of them " have no necessary or natural connection with those sustained " by another. Admitting the jurisdiction of the court, each of " these complainants might *sue separately*, either in a court " of law or equity, without consulting with any other one, " and without in the least degree affecting his rights. On " the other hand, the suit is brought by all of them against " one common defendant. They all complain of injuries " similar in their character, and seek a similar relief; and " therefore have a common object in view."

" This is not a bill of peace: and I believe that it has not " been contended that a landholder in the county of Morris " or Warren, not coming in and making himself a party to " this suit, would be in any wise affected by it. I think the " principle laid down in *Cooper* is the correct one; that it is " fairly deducible from the cases and must govern this, viz, " that the court will not permit several plaintiffs to demand " by one bill, several matters perfectly distinct and uncon-

" nected, against one defendant; nor one plaintiff to demand " several matters of distinct natures, against several defend- " ants. And according to this principle I feel constrained " to say, that the bill cannot be sustained. There is no kind " of privity between these complainants; there is no general " right to be established as against this defendant, except the " general right, that a wrong-doer is liable to answer for his " misdeeds to the injured party: which surely does not re- " quire to be established by such a proceeding as this. The " utmost that can be said, is, that the defendant stands in the " same relative position to all these complainants. There is " no common interest in them all, centering in the point in " issue in the cause; which is the rule in 2 *Anst.* 469."

" The bill is obnoxious to the same objection, whether the " demand made by it be considered as arising *ex contractu* or " *ex delicto*. It is well settled that a bill by several to com- " pel the specific performance of a contract for the sale of real " estate, in which the complainants hold distinct rights, can- " not be sustained. This conclusion renders it unnecessary, " and perhaps improper, for me to look into any other parts " of the case. On the ground that the bill is multifarious, " the injunction is refused."

Saxton, 34, 35, 36, 38, 39.

Armstrong and others vs. *The Treasurer of Athens County*. In 1804 the legislature of Ohio passed an act establishing the University of Athens, and exempting forever from taxation lands owned by it at that time or afterwards acquired by it. Complainants afterwards acquired title to portions of this land from the University, each obtaining title to a separate parcel. In 1840 the legislature passed a general act declaring all land theretofore owned by colleges, and exempt from taxation, to be subject to taxation as soon as sold by the college or other institution of learning. The State thereupon assessed a tax upon the separate parcels of land owned by complainants, and they filed their joint-bill to enjoin the tax, on the ground that the last-named act was

in conflict with the Constitution of the United States as impairing the obligation of a contract, and therefore the tax illegal and void. Hitchcox, J., in delivering the opinion of the court, says: "There is one question which seems to have "been overlooked by counsel, but which, it is apprehended, is "decisive of the case. Here are several complainants having "no community of interest, yet joining in the same bill. It is "true, they hold land derived from the same source, and "charged with a tax under similar circumstances. But still "they hold in severalty separate parcels of land, each parcel "charged with a separate amount of tax, and each parcel liable "for the tax charged upon itself. Under these circumstances, "there is an improper joinder of parties, and for this reason, if "for no other, the bill must be dismissed."

Armstrong *et al. vs.* Athens Co., 10 Ohio, 235.

The doctrine of the foregoing cases has been recognized by the Supreme Court of the United States in the case Yeaton *vs.* Lennox.

In that case several parties gave their notes for money supposed to be due them on account of the same transaction, with an understanding that if it should thereafter appear that they were not so liable, the money should be refunded, if they had to pay the notes. They paid the notes at maturity, and, it having been subsequently determined that they were not liable to pay the money, they joined in a bill to recover the same back.

Chief-Justice Marshall delivered the opinion of the court:

"The plaintiffs, who unite in this suit, claim the return of "money paid by them severally on distinct promissory notes. "They are several contracts, having no connection with each "other. These parties cannot, we think, join their claims in "the same bill.

"The appellants contend that several creditors may unite

" in a suit to attach the effects of an absent debtor. We do " not think so. They may file their separate claims, and be " allowed payment out of the same fund, but cannot unite in " the same original bill."

8 Peters, 123.

This question of multifariousness is raised in the answer to the Bill, as well as by demurrers; and it appears to be sufficient to dispose of the case.

Second.

THE BILL INEQUITABLE.

The grounds upon which the intervention of equity is invoked will be found in the original and supplemental bills. The *amended* bill and the demurrers and answers to it cannot be regarded as a part of the pleadings. The application for an injunction on amended bill was, on motion of complainants, withdrawn on the 9th day of November, 1872, (Transcript of Record, p. 59,) and issue finally joined on the original and supplemental bills.

Transcript of Record, p. 73.

What, then, are the grounds upon which the intervention of equity is invoked? They are these:

ORIGINAL BILL.

1. That the Board of Public Works acted illegally, " *and* " *without any warrant whatever of law*," in disregarding the contract made between the city of Washington and George W. Linville; and (2) by ordering, under date of July 3, 1871, the sewer mentioned in the contract to be constructed in a different manner and of different dimensions; and (3) in carrying out the order to have it so constructed.

Transcript of Record, p. 3, § 7.

2. That the Board acted *illegally in various particulars*,

and among them (1) in charging for superintendence; (2) in charging each lot with a proportionate share of the cost of the entire street, instead of with its own special improvements; (3) in exempting church and school lots; (4) in adding the amount of the exemptions to the special assessments; (5) in adding 5 per cent. of the cost arbitrarily to the assessment; (6) in including the cost of curbing, for which it is alleged there was no contract and "no warrant of law;" (7) in including the expense of a 6-foot sewer along Water street, between Sixth street west and Seventh, not embraced in the contract with Linville or any other, and not chargeable in any event to complainants; (8) in taking away old material, and alleged to have been converted to the private use of defendants, and not credited in making the assessments; (9) in extravagant and excessive charges, and (10) in over measurements.

Transcript of Record, p. 4, § 11.

3. That the work was not done according to the original contract with Linville; that if it had been, complainants would not have been chargeable with more than $2.64 per front foot, instead of $8.74\frac{41}{100}$, as now charged; and that they do not owe more than $2.64 per front foot on a fair accounting.

Transcript of Record, p. 3, § 98.

4. That the Board of Public Works acted fraudulently as well as illegally in the foregoing enumerated particulars.

Transcript of Record, p. 4, §§ 11 and 12.

5. That the Board of Public Works confederated with Linville and Gleason for the purpose of defrauding in allowing the work to be improperly done.

Transcript of Record, pp. 4 and 5, § 12.

6. That the sewerage and paving were imperfectly done, and not according to the contract; that in the construction of

the sewer, the earth, as filled, was not puddled; that there was no systematic inspection of the work as it progressed; and that the foundation of the pavement is not of clay, free from loam.

Transcript of Record, p. 3, § 8.

7. That the certificates of indebtedness proposed to be issued by the Board of Public Works will constitute a cloud upon the title of their lots.

Transcript of Record, p. 2, § 4.

SUPPLEMENTAL BILL.

8. That subsequent to the filing of the original bill "the "wooden carriage-way has proved grossly defective, and re- "quired frequent repairs, and that the sewer has proved in- "sufficient for its purposes, and been productive of loss to "the property of complainants."

9. That the Legislative Assembly on the 29th day of May, 1873, passed an act entitled "An act for extending the time "of payment of special assessments, and for other purposes," and allowing certificates to be paid in five equal annual instalments, and that on the 11th day of September, 1873, the complainants made tender of one-fifth of the annual instalments to the collector of the Board of Public Works, agreeably to said act.

Third.

ILLEGALITY.

It will be seen, by reference to the analysis heretofore given on pages 45–6, that the first ground alleged in the bill on which a court of equity is asked to interpose is, that the Board of Public Works acted illegally, irregularly, and unjustly in various particulars, viz:

First. In relation to the contracts under which the work was done.

Second. In the manner in which the work was done; and,

Third. In the manner in which the assessment was made after the completion of the work.

It is obvious that, while differing in terms, these are all statements or propositions of *general or partial illegality.*

But it is well settled that illegality, in whole or in part, in a tax or assessment, constitutes no ground upon which to justify the interposition of a court of equity to restrain the collection of such tax or assessment by injunction.

In the State railroad tax cases, Mr. Justice Miller, speaking upon this subject for this court, says:

"It has been repeatedly decided that neither the *mere illegality* of the tax complained of nor its *injustice* nor *irregularity*, of themselves, give the right to an injunction in a court of equity."

2 Otto, 613.

Additional authorities are numerous.

Dow *vs.* Chicago, 11 W., 109.

Hannewickle *vs.* Georgetown, 15 W., 547.

Ewing *vs.* St. Louis, 5 W., 413.

And other cases cited in First National Bank *vs.* Shoemaker, No. 531, pp. 21 to 27.

Fourth.

FRAUD.

It must be admitted that fraud, (if it exists,) and when properly charged in a bill, is an exceptional ground of equity jurisdiction. But it will be seen from pages 45–6 that the allegations of fraud are not of the character necessary to invest equity with jurisdiction, but are confined to the mode in which the work was executed, and the manner in which the assessments were made. It involves these, and nothing more,

and thus presents only questions of the quality of the work and of the charges for it. It is therefore clear that the words "fraud" and "defrauding" are not used in the bill in a sense that would justify the interference of equity. They are in fact used in the bill in reference to mere incidents or a few particulars of at least a substantially authorized improvement, carried on and completed by a legal and competent authority. This is not and cannot be the fraud in reference to which equity would interpose by injunction.

Fifth.

CLOUD ON TITLE.

Are the certificates of indebtedness a cloud upon the title to complainants' lots in that sense which would authorize a court of equity to interfere to remove the cloud? And here the two positions of the complainants should be remembered, viz: (1.) That the certificates are void for want of legal authority in the Board to issue them. (2.) That if the Board had legal power to issue them in making the assessment, they included items which were illegal and improper, and that the certificates issued would be for a greater amount than they should have been.

In neither aspect would these certificates constitute a cloud upon the title. Certificates valid for any sum cannot be a cloud upon title. Certificates absolutely void for want of authority to issue them cannot create a cloud, because the very law and record that is relied upon to show their legal existence, would show that they are void.

Ewing *vs.* St Louis, 5 W., 413.

And cases cited in—

First National Bank *vs.* Shoemaker, pp. 28–52.

Sixth.

The first point made in the supplemental bill for equitable

interference is, that since the filing of the original bill "the "wooden carriage-way has proved grossly defective," and "that the sewer has proved insufficient for its purposes."

It can hardly be contended that any mere defect in the work, especially if discovered a month after its completion, can be a ground of equitable interference, if the Board had the legal power to have the work done, and make the assessment, and issue the certificates therefor.

The only other point made in the supplemental bill is that under the act of the Legislative Assembly of the District of Columbia, passed May 29, 1873, the complainants were allowed to pay certificates in five equal annual instalments from the date thereof; and that the Board of Public Works had no right to cause said lots, or any part thereof, to be sold, as they had tendered the first instalment, which alone was due at the time of filing the supplemental bill.

But it will be observed, by reference to the fourth section of the act, that all assessment-certificates "*theretofore*" issued by the Board of Public Works, and not paid in full at the expiration of one year from their date, *on request of the holders* and due assignment thereof, were authorized to be purchased by the commissioners of the sinking fund, and held and collected on their account, as provided by sections two and three of the act. This could only be done, however, with the consent and at the request of the holders of such certificates. The Legislative Assembly expressly recognized the principle that it had no right or power to extend the time of the payment of such certificates as might be in the hands of *bona fide* holders for value without their consent. These certificates had been issued, and passed into the possession and control of the bank more than six months prior to the passage of this act. The claim of the plaintiffs that they had the right to pay these certificates in five equal annual instalments is, therefore, by the terms of the act itself, wholly without foundation.

Besides, if the act could be construed as intending to give

complainants that right, the attempt of the Board of Public Works to enforce the payment of the whole amount at one time could not constitute any ground for equitable interference. If the law authorized the payment of these certificates as contended, and the Legislative Assembly had the constitutional power to enact it, and complainants made the tender of the first instalment as they pretend, and the Board refused to accept, no sale made after that for the whole amount of the certificates would be valid, and the purchaser at such sale would get no title. The act is a public one, of which all persons are bound to take notice.

The allegations of the bill and supplemental bill, have thus been briefly examined, and they appear totally insufficient to give a court of equity jurisdiction to interfere by injunction to restrain the collection of these assessments.

But it is to be borne in mind that all the allegations of fact in the bill, amended bill, and supplemental bill, in relation to illegal acts, the improper conduct of the Board of Public Works, the defective and insufficient character of the work, and the fraudulent acts, intentions, and confederations of the defendants, are fully and explicitly denied, and there is no proof in the record in support of them. So that if there had been any equity in the bill, it would have all been "sworn away" by the answers.

Seventh.

EQUITABLE ESTOPPEL.

If the complainants ever had any right to come into a court of equity for relief, have they not lost it by long delay, and acquiesence in the special improvements of which they now complain?

The contract of the city of Washington with Linville was made in March, 1871, and on the 12th day of July, 1871, the modifications of that contract were agreed upon between Linville and the Board of Public Works, and both of these oc-

currences were of general and public notoriety. The work was commenced and prosecuted during the summer and fall of the year of 1871, with the knowledge and under the daily observation of the complainants. They were fully informed, not only that the work had been contracted for, and was in progress, but also of the manner in which it was being done, and the material with which it was being constructed. The work was completed in December, 1871, and the assessment made against complainants' property as soon afterwards as practicable. Notwithstanding all this, it was not until September, 1872, when the Board of Public Works was about to issue certificates of indebtedness against the property of complainants, nine months after the completion of the work, and after the United States and the District and some individuals owning property along the line of the improvement had paid the assessments against them, that complainants filed their bill.

If any of the matters of which they now complain had any foundation in fact, it was their duty to complain at the earliest possible time, and before other persons and parties had incurred responsibilities, on the faith of their acquiescence. Having failed to do so, it was too late for them to complain, when they filed their bill.

They are estopped by their conduct.

Swain *vs.* Seaman, 9 Wall., 272.

Kellogg *vs.* Eli, 15 Ohio State R., 66.

People *vs.* Com. Council of Utica, 65 Barb., 21.

And other cases cited in First National Bank *vs.* Shoemaker, pp. 54, 58.

Eighth.

Did the Board of Public Works, as respects the improvements of Seventh street, act in any respect illegally or incorrectly?

First. The complainants assert that the contract made

by the mayor, board of aldermen, and common council of the city of Washington, on the 30th day of March, 1871, with Linville, was legal and binding. But this may well be doubted.

The first section of the act of Congress of the 21st day of February, 1871, *created* all the territory of the United States included within the limits of the District of Columbia into a municipal government by the name of the District of Columbia, and authorized it to *contract and be contracted* with by that name. Upon the approval of the act, the new government existed and could make ordinary contracts as soon thereafter as its executive officers were appointed and qualified, and contracts to bind the District for improvements and repairs as soon as appropriations were made. This was the manifest intention of Congress, and is the construction placed upon it by the President and the Senate, for immediately after the 21st of February, 1871, the Governor and members of the Board of Public Works were nominated, confirmed, and commissioned, and entered on the 16th of March on the practical performance of their duties.

From that time, therefore, the District of Columbia, through the Board of Public Works, had full control over the streets, avenues, alleys, and sewers of the city of Washington. This power was sufficient to prevent any interference with them by any other body, natural or artificial, by contract or otherwise; and hence any contract made by the mayor, board of aldermen, and common council of the city of Washington, after the 21st day of February, 1871, or on the 30th of March, was void *ab initio*. The Supreme Court of the District of Columbia, in May, 1871, in General Term, decided that the authorities of the city of Washington could make no binding contract for improvements after the 21st day of February, 1871. (See Transcript of Record, p. 30, answer of Linville.) It cannot be supposed that Congress intended that there should be two bodies in existence at the same time authorized to contract in relation to the same matter, or to exercise control over

the streets, avenues, sewers, &c. It is true that the charters of the cities of Washington and Georgetown were continued in force until the first day of June, 1871, but this was clearly for limited and specified purposes only, or to perform required acts for the public peace, and otherwise, during the full transition of the old government into the new. In some respects the transition was necessarily immediate and complete; in others, gradual and imperfect. Moreover, as appears from the charters of the old governments as respects contracts, they were continued only for the purpose of "the "enforcement of all contracts *made*" or existing on the 21st of February, 1871, and not for the making of new contracts.

Second. But this may be immaterial; for on the 1st day of June, 1871, the charters of the old governments ceased entirely to exist, except in the particulars mentioned in the provisoes, and at the same date their offices were entirely abolished, and the District of Columbia, as declared in the 41st section of the act of February 21, 1871, became in all respects their successor; and from that date had unquestionable control over the streets, avenues, alleys, and sewers, through the Board of Public Works, and the right to make contracts in relation to them, upon the making of appropriations, general or special; and this power included that of rescinding or modifying contracts. Antecedent appropriations having been made by the Legislative Assembly of the District of Columbia on the 10th day of July, 1871, on the 12th day of July, 1871, the Board of Public Works had, therefore, the power, with the consent of Linville, (if his contract was valid,) to alter or rescind it, and to enter into the contract with Gleason. And this is exactly what they did.

The Assessments and Certificates.

The thirty-seventh section of the act of Congress of the 21st of February, 1871, among other things provides that "they "(the Board of Public Works) shall disburse upon their

" warrant all moneys appropriated by the United States or the " District of Columbia, or collected from property-holders, in " pursuance of law, for the improvement of streets, avenues, " alleys, and sewers, and roads and bridges; and shall assess " in such manner as shall be prescribed by law, upon the " property adjoining and to be especially benefited by the " improvements authorized by law and made by them, a rea- " sonable proportion of the cost of the improvement, not ex- " ceeding one-third of such cost, which sum shall be collected " as all other taxes are collected."

By section seventeenth of an act making appropriations to supply deficiencies in the appropriations for the service of the year ending April 20, 1871, &c., it was enacted that " private property shall be assessed for the improvement " of M street, and Seventh street southwest, from B street " to the river, heretofore authorized by law, as provided " in the act of February twenty-first, eighteen hundred and " seventy-one."

U. S. Statutes at Large, vol. 16, p. 309.

It is true that this provision of the act of April 20, 1871, is silent upon the question of the manner in which such assessments should be collected. But, in requiring that the cost of the improvement of Seventh street should be *assessed* as provided in the act of February 21, 1871, by implication it is implied that it should be *collected* in the manner therein prescribed. This is the true rule of construction; and if it were not adopted, the act of Congress of April 20, 1871, would involve the absurdity of authorizing an assessment without giving efficiency to it by providing a mode for collection.

The rule of construction, with regard to what may be implied in a statute, has been clearly stated by this court in the case of the United States *vs.* Babbitt, in which Mr. Justice Swayne says: " What is implied in a statute, plead- " ing, contract, or will, is as much a part of it as what is " expressed."

"A thing within the intention of the makers of the stat-
" ute is as much within the statute as if it were within the
" letter."

1 Black, 61.

The same doctrine is reiterated in the case of Gelpeke *vs.* City of Dubuque, (1 Wall., 22.)

So it will be seen that Congress not only authorized the one-third of the cost of said improvement to be charged on the lots adjoining and to be especially benefited thereby, as prescribed in the act of the 21st of February, 1871, but also to be collected as required thereby.

On the 10th day of August, 1871, the Legislative Assembly of the District of Columbia passed an act, by the first section of which it is enacted: "That whenever any of the improve-
" ments mentioned or referred to in section thirty-seven of
" the 'act of Congress of the 21st of February, 1871,' shall
" be completed, a statement of the cost thereof shall be pre-
" pared by the Board of Public Works, and be filed in the office
" thereof; and immediately thereafter an assessment based
" upon said statement shall be made, as provided for in said
" section of said act, which said assessment shall be collected
" by said Board, in the same manner as other taxes of the
" District of Columbia are now or may hereafter be author-
" ized to be collected."

See Acts of First Session, Legislative Assembly, District of Columbia, ch. 24.

The third section of the act of August 10, 1871, authorizes and requires the Board to issue certificates of indebtedness against the property assessed if the assessment remains unpaid for 30 days after notice thereof be given to the owner, and to cause the property, or sufficient thereof, to be sold for the payment of such certificates, with interest thereon at 10 per centum per annum, if they remain unpaid for one year after the date thereof.

It is clear that this section necessarily applies to the im-

provement of Seventh street, and provides the manner in which the assessment for the cost of that improvement should be collected. It is, indeed, the only manner "prescribed by "law."

Church and School Property.

It is next insisted that the assessment was illegally increased by the omission to charge church and school property, and the addition of sums for superintendence, engineering, and other incidental expenses.

But the omission was proper, because church and school property were exempt by law from assessment.

See act of Congress approved June 17, 1870, 16 U. S. Stat. at Large, p. 153, ch. 131.

This act was not repealed by implication by the 37th section of the act of February 21, 1871.

Brown *vs.* County Commissioners, 9 Harris' Penn. Rep., 37.

The State, &c., vs. *The Mayor, &c., of Newark:* In 1849 the Protestant Foster Home Society of the city of Newark was incorporated to provide for the support of destitute children, and its charter enacted that its property "shall not be "subject to taxes or assessments." In 1869 two assessments for benefits were made—one for opening Sumner avenue, and the other for curbing and flagging Second avenue. The legality of these assessments was disputed, and the question was taken to the Court of Errors and Appeals of New Jersey. Dodd, J., delivering the opinion of the court, says: "The "single question is, are the assessments complained of within "the exempting words of the charter?"

"I think they are; * * * * * the legislative intent "is, in this instance, too clearly and distinctly expressed to "be open to doubt. In interpreting statutes words must be "taken in their plain and natural sense—the sense given to "them by approved and general usage. The exempting

" words here are 'taxes and assessments.' In popular accep-
" tation, in legislative enactments, and in judicial decisions,
" these words have a different meaning, apply to different
" matters, and cannot be treated as synonymous terms."

It will be observed that the exempting words in the act of Congress in relation to church and school property is much more comprehensive than those above quoted.

For other authorities upon this point see First National Bank *vs.* Shoemaker, pages 65 to 68, inclusive.

Charges of Superintendence, &c.

The charges for superintendence, engineering, and other incidental expenses, are legal and proper charges. The power to contract for and carry on the improvement includes and implies the power to make all contracts, and do all things necessary for the full completion of the work. It is evident that engineering, superintendence, clerk hire, and various other incidental expenses were indispensable to the proper and efficient conduct of the work. The bill alleges that this charge is illegal, unnecessary, and arbitrarily added. The answers deny this, and say that the charge is reasonable and proper, and such as is usual in such work. In Angell and Ames on Corporations, p. 88, sec. 111, the authors say: " But the dealings of
" a corporation, which, on their face, or according to the ap-
" parent import, are within its charter, are not to be regarded
" as illegal or unauthorized without some evidence to show
" that they are of such a character. In the absence of proof
" there is no legal presumption that the law has been violated.
" On the contrary, it has been said, 'these artificial bodies,
" like natural persons, are entitled to the benefit of the rule
" which imputes innocence rather than wrong to the conduct
" of men.' And if a municipality is authorized 'to establish
" and regulate markets,' it may purchase lands upon which to
" erect a market building, *and may employ an architect to*
" *prepare plans, specifications, &c., for such a building.*"

To the same effect is the language of Mr. Justice McLean,

in the case of Sturtevants *vs.* The City of Alton, (3 McLean's Rep., pp. 395 and 396 :)

"Congress 'have power to establish post-offices and post-"roads' by the Constitution, and in carrying out this prin-"ciple the mail operations of the Union are regulated, "postmasters are appointed and their duties prescribed, mail "contractors and carriers of the mail are regulated, and pro-"vision is made for the punishment of all depredations on "the mail. This power is considered as an incident to the "principal power, and every one must see that without its "exercise effect could not be given to the main power.

"The same principle holds in relation to a corporation. It "has power to pave streets, widen them, &c.; consequently it "may make contracts for such improvements. It has power "to levy a tax; consequently it has power to appoint an as-"sessor and collector."

In the case of Gibbons *et al. vs.* The City of Chicago, (22 Ills., 566,) it was said that "the expenses of engineering and "superintending is a part of the indispensable expenses of "the improvement, and is properly included in the account."

Authorities to this point might be multiplied, but it is deemed unnecessary. It is manifest that these items were properly charged in the assessment.

The position of the complainants upon this point is irreconcilably inconsistent. One allegation of their bill is that there was no regular and systematic inspection of the work as it progressed; and another is that the expense of superintending, &c., is illegal, and should not have been included in the assessments.

See pp. 3 and 4, Transcript of Record.

"He is not to be heard who alleges things contradictory to "each other!"

(Broom's Legal Maxims, *vide* page 127.)

Ninth.

THE BOARD OF PUBLIC WORKS A LOCAL TRIBUNAL.

If the Board of Public Works had power to make assessments and issue certificates of indebtedness, will equity interfere with the exercise of its judgment and discretion?

The authorities, as well as reason, give an emphatic negative answer to the question.

Ewing *vs.* City of St. Louis, 5 Wall., 413.

Heine *vs.* The Levee Commissioners, 19 Wall., 660.

The language of Mr. Justice Miller in delivering the opinion of this court in the State railroad tax cases (2 Otto, at page 616) is especially applicable to this view of the case. He says: "If there is an excessive estimate of the value of "the franchise or capital stock, or both, it is by an error of "judgment in the officers to whose judgment the law con- "fided that matter; *and it does not lie with the court to sub- "stitute its own judgment for that of the tribunal expressly "created for that purpose.*"

If, then, the Board of Public Works was the proper party to have control of the work and to make the assessments, this point alone would seem to be conclusive.

Tenth.

RATIFICATION BY THE DISTRICT OF COLUMBIA AND CONGRESS.

Ratification of the acts of an inferior or local tribunal, or of an agent, is equivalent to original power. This will not, perhaps, be seriously questioned.

Cooley on Const. Lim, pp. 369–371.

First.

CONGRESS.

What are the facts?

First. By the act of April 20, 1871, authorizing the im-

provements on Seventh street to be assessed as prescribed in the 37th section of the act of February 21, 1871, there is a direct ratification of the improvement.

Seeond. The laws of the Legislative Assembly, as well as the acts of the Board of Public Works, were required to be transmitted to Congress, and were.

16 Statutes at Large, p. 419.

Hence it may be inferred that its transactions in reference to Seventh street were approved. The case of Clinton *vs.* Englebrecht (13 Wall., 446) is directly relevant.

Third. But the approval is positive and direct.

The act of Congress approved June 20, 1874, modifying the government of the District, expressly authorized the Commissioners to make contracts "for the protection and preser-"vation of improvements *existing* or commenced." The improvements of Seventh street were "*existing*" at the date of the passage of the act.

Fourth. The second section authorized the board of audit to audit all contracts made by the Board of Public Works, oral or written.

Fifth. Congress, on the 10th day of June, 1872, appropriated $192,620.00 for improving road-ways, &c., in front of property of the United States, (17 Statutes at Large, 352,) and on the 8th day of June, 1873, $1,241,920.92, (17 Statutes at Large, 405,) besides other appropriations. By reference to transcript of record, page 24, it will be seen that $24,914.79 of the improvement was charged to the United States, and, in fact, embraced in these appropriations.

Sixth. The assessment act of the Legislative Assembly of the 10th of August, 1871, was directly approved, and, as a consequence, the assessments and the certificates issued. This was done by the 15th section of the act entitled "An act "for the support of the District of Columbia for the fiscal "year ending June 30, 1876, and for other purposes," approved the 3d day of March, 1875, nearly a year after the Board of Public Works had ceased to exist. The entire

section is as follows: "SEC. 15. That the third section "of the act of the Legislative Assembly of the District of "Columbia, entitled, 'An act prescribing the mode of assess- "ment for special improvements, and providing for the col- "lection thereof,' approved August tenth, eighteen hundred "and seventy-one, shall be, and is hereby, amended so that "the sales under said law shall be advertised twice a week "for three successive weeks, instead of as heretofore re- "quired."

18 Stats., 505.

Second.

LEGISLATIVE ASSEMBLY.

In view of this conclusive ratification by Congress, it will be sufficient to merely refer to the ratification by the Legislative Assembly.

First. The "Act providing for the payment of damages "sustained by reason of public improvements or repairs," approved June 20, 1872, provided for the assessment of damages occasioned by improvements made by the Board of Public Works, without excepting any improvements made by it. As the Seventh-street improvement existed at that time, it was, by necessary implication, an approval of it.

Second. By the act of May 9, 1873, the time of payment for improvements made by the Board of Public works was extended five years, and it was provided that certificates outstanding should be purchased by the commissioners of the sinking fund, at the request of the holders and on assignment. In this act both "*work done and in progress*," and certificates issued for completing improvements, were recognized. As one of the grounds of equity jurisdiction, the bill sets forth this act, which is a direct approval of all the Board has done, and included the assessments on Seventh street, and the certificates issued therefor.

It thus appears that Congress and the Legislative Assembly have *approved* and sanctioned in the most direct and positive manner all the improvements made by the Board of Public Werks, including the Seventh-street improvements, and the assessments and certificates issued.

Nor has Congress or the Legislative Assembly in any manner *disapproved* of such improvements, assessments, or certificates.

The First National Bank of New York a bona fide holder of the Certificates.

But if the Board of Public Works acted in any particular illegally, would its misconduct or misconception affect the Bank as the *bona fide* holder of the unpaid certificates issued against the appellants' property?

It is to be observed that the District of Columbia does not dispute the validity of these certificates. It received a just and fair consideration for them, and enjoyed the advantage of them. It admits the justness and validity of the claim of the Bank.

The complainants declining to pay for the improvement of which they received the benefit, the Bank furnished the money to enable the Board to meet its obligations, and received these certificates, recognized to be transferable by the law that authorized them, and by every subsequent act passed in relation thereto.

It is difficult to see on what ground of equity these certificates can be assailed in the hands of the Bank, especially by the appellants, in view of their acquiescence in the work, and delay in asserting their pretended rights.

The ordinary rule applicable to this class of paper has been clearly announced by this court repeatedly.

Mercer County *vs.* Hackett, 1 Wall., 83.

Meyer *vs.* Muscatine, 1 Wall., 384.

Moran *vs.* Miami County, 2 Black, 733.

And other authorities cited in First National Bank *vs.* Shoemaker, pp. 83 and 84.

It will be seen that some of the questions presented in this case have been little more than stated. They are more fully considered in the appellants' brief in the case of the First National Bank of New York *vs.* Shoemaker, to which the court is respectfully referred if a fuller consideration is deemed necessary.

A case more void of all grounds of equity could hardly be presented.

Full authority of law is found, clear, plain, and explicit, in the acts of Congress, and the acts of the Legislative Assembly of the District of Columbia, for every step taken and act done by the Board of Public Works. Besides, Congress and the Legislative Assembly of the District both passed subsequent acts, by implication and expressly ratifying what the Board had done. All allegations of the bill in relation to illegal and improper acts on the part of the defendants, and in relation to irregularities, mistakes, improper conduct of the work, poor material and bad workmanship, fraud in the members of the Board, and confederation between it and the contractors, are met by explicit denials in the answers of each of the defendants, and there is no proof to overcome the denials.

Moreover, if there were any illegal acts of the Board as claimed by the appellants, they had a clear, plain, and adequate remedy at law by *certiorari*. And if that remedy is not now open to them, they still have the right to an action of trespass or case, and could protect any rights they may have in an action of ejectment, if instituted.

It is respectfully submitted that the appellants, in any as-

pect of their case, have no standing in a court of equity, and that the real equity of the case is with the District of Columbia and the "First National Bank of New York," the appellees.

WILLIAM A. COOK,
WALTER S. COX,
Solicitors for Appellees.

APPENDIX.

Answer of First National Bank of New York, (Filed January 29, 1874.)

(Omitted from Transcript of Record.)

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

GEORGE MATTINGLY *et al.*
vs.
THE DISTRICT OF COLUMBIA *et al.*
} *Equity.* *No.* 2,910.

The separate answer of the First National Bank of New York to the supplemental bill filed by the complainants in the above-entitled cause.

The said First National Bank of New York, by special leave of the court, for answer to the said supplemental bill, says as follows:

First. That it is a corporation duly organized and doing business in the city of New York, in pursuance of the provisions of the act of Congress entitled an "Act to provide a "national currency," &c., approved February 25, 1863.

Second. That on or about the 14th day of November, 1872, and before the passage by the Legislative Assembly of the District of Columbia of the act entitled "An act for extend-"ing the time of payment of special assessments, and for "other purposes," approved May 26, 1873, the said Bank, in the regular course of its business, purchased, for a valuable consideration, a large number of certificates issued by the Board of Public Works of the District of Columbia by virtue of the act of the Legislative Assembly of the District of Columbia entitled "An act prescribing the mode of assessments "for special improvements, and providing for the collection

"thereof," approved August 10, 1871, against the property mentioned in Exhibit No. 1 of complainants' original bill, and that said Bank is now the lawful owner and holder of such certificates, and was such long before the passage of the said act of May 26, 1873, and the filing of the supplemental bill herein; and further, that said certificates have not, nor has any part of them, been paid to the said Bank.

A more complete description of the certificates now held as aforesaid by said Bank is given in a paper herewith filed and marked Exhibit A.

Third. The said Bank, further answering, says that it has no knowledge of the various allegations contained in said supplemental bill, and therefore neither admits nor denies them, and insists upon strict proof thereof.

Fourth. The said Bank is advised and believes, and therefore charges, that the said complainants ought not to maintain their said bill or supplemental bill of complaint because of the misjoinder of parties plaintiff therein, and the said Bank prays that it may be allowed the same benefit and advantage of this error in the said bills by this its answer as if the said objection had been insisted upon by special demurrer.

Fifth. The said Bank says that it is advised and believes, and therefore charges, that the Legislative Assembly of the District of Columbia possessed no lawful right or power to enact any law extending or changing in any way the time of payment fixed in and by the terms of the said certificates after the said certificates had passed into the hands of third persons for a valuable consideration.

THE FIRST NATIONAL BANK
OF THE CITY OF NEW YORK.
By GEO. F. BAKER.

ENOCH TOTTEN,
Solicitor for First National Bank, New York.

COUNTY OF NEW YORK, }
State of New York, } ss:

I, George F. Baker, being first duly sworn, do depose and

on my oath say that I am cashier of the First National Bank of New York; that I have read the foregoing answer signed by me in behalf of said Bank, and know the contents thereof; that the facts therein stated positively I know to be true, and the facts therein stated on information and belief I believe to be true.

GEO. F. BAKER.

Subscribed and sworn to before me, this 28th day of January, 1874.

FISHER A. BAKER, [L. S.]
Notary Public, N. Y. City and County.

NOTE.—Exhibit A consists of a list of certificates.

In the Supreme Court of United States.

OCTOBER TERM, 1878.

THE MATTINGLY CASE, No. 8,

THE SHOEMAKER CASE, No. 239,

HEARD TOGETHER.

Reargued by order of the Court.

ARGUMENT OF Mr. RIDDLE FOR THE DISTRICT.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1878.

Supreme Court of the United States.

October Term, 1878.

THE MATTINGLY CASE, No. 8.

THE SHOEMAKER CASE, No. 239.

Mr. Riddle's Argument for the District.
Court Orders Reargument.

MAY IT PLEASE YOUR HONORS:

In the Mattingly case a number of parties, owners in severalty of sundry lots, join as plaintiffs to enjoin collection of special assessments for the improvement of Seventh street west, from B street to the river.

In the Shoemaker case effort is made to stay a like assessment for the improvement of Seventh-street road, from Boundary street to the Maryland line.

STATEMENT OF ATTENDING FACTS.

The ordinances of the city of Washington of May 9 and June 10, '70, and of March 28, '71, authorized a sewer and pavement to be laid on Seventh street; the whole cost to be charged on adjoining property and the Seventh-Ward fund.

The Mayor contracted with Linville, a party to the suit, to do the work, who entered upon and was performing the same.

February 21, 1871, Congress passed the act of creating the late District Government, the 37th section of which created the late Board of Public Works, and placed all the streets, avenues, roads, alleys, and sewers under their control. (App. A to Brief, p. 29.)

The Board was duly appointed in March, and under an act

of April 20, 1871, it was organized, and entered upon its duties.

17 Stats., p. 7, second paragraph from top of page.

The 41st section of the new organic act continued in force the ordinances of the cities till amended or repealed.

Sec. 91, Rev. Stats. D. C., p. 9.

The Board of Public Works recognized the ordinances of the city and contract with Linville, took charge of the work, made such changes as they deemed requisite, completed the work, assessed one-third of the cost on the adjoining property, gave the notice, said assessments were not paid, and the Board was about to issue certificates of indebtedness against the property, when the plaintiffs interposed by their bill.

The bill sets up all the claimed facts *in extenso*.

The answer meets it fully.

The case stands on bill and answer.

So also of the Shoemaker case.

This was an improvement initiated by the board, and prosecuted declaredly under the 37th section of the act of Congress and the act of the District Legislature.

The ultimate facts of both cases I have set forth on the second and third pages of my first brief, as also the questions involved on pages three, four, and five. The appendix contains the statutes.

The sole question I propose now to argue, common to both cases, is, whether these assessments were pursuant to law. This is the leading question in both cases; in all the fifty or one hundred pending cases. The Mattingly and Shoemaker bills declare that the assessments were made without authority of law.

The Statutes.

The 4th paragraph of section 37, which created the Board of Public Works, declares that the Board shall assess a reasonable portion of the cost of all improvements made

by it on the property adjoining and to be especially benefited thereby, not exceeding one-third, as shall be prescribed by law. (App., pp. 29, 30.) The first section of the act of the District, of August 10, 1871, requires that when an improvement is completed a statement of the whole cost shall be prepared and filed, and an assessment based thereon shall be made, as provided by said 37th section, and collected by said Board in the same manner as other taxes of the District are collected. (App. B, p. 31.)

The Objection.

It is objected that this act does in no way prescribe the manner of making the assessment. It merely leaves that matter where the act of Congress left it. By its title it professes to prescribe the mode, but utterly fails to do so in every respect. Hence there is no law.

It is admitted that no subsequent statute was passed prescribing the manner. The Legislature seemed to think that the 37th section was clear and sufficient for this purpose in itself. Congress thought so too.

On the 10th of April, six weeks after the passage of that 37th section, Congress provided that the cost of the then pending improvement of M street, and these improvements of Seventh street, should be assessed on the adjoining property *in the manner prescribed by the 37th section of the act of February* 21, 1871, just as if that did prescribe the manner, and no further law was necessary.

Stats. 17, p. 10, sec. 17.

Apparently, both bodies saw this manner on the face of this act, or they saw such existing law or universal custom amounting to law, that the manner was already well known.

The State of the Law and Condition of Things.

Every law is addressed to a people with special reference to their surroundings, experience, and habits. It silently takes

notice of existing law, customs, and methods, and is to be construed with special reference to them all.

The expression of the act "in such manner as shall be prescribed by law" may as well be answered by existing law as by one to be enacted thereafter.

The main fault found with the assessments are that they were assessed upon property by frontage—the whole of one-third divided by the whole number of feet front.

We have been improving streets here, by express acts of Congress, for seventy-five years, and assessing the cost upon the property of the District, and always by one method. Let us see if there could be doubt about this thing.

In Georgetown.

The first law of Congress bearing on this subject was the act of May 3, 1802, amending the old Maryland charter of Georgetown, and it expressly authorizes the cost of street improvements to be charged upon the property fronting on the street not to exceed $2 per foot front.

1 Stats., 195, App. C., p. 33.

This was further amended, and the provision continued by act of March 3, 1805.

2 Stats., 334, App. C., p. 33.

This rule, thus prescribed, governed the improvement of all the streets of Georgetown from 1802 to the present; and these amendments of the charter was the law of that part of the District when the act of February 21, 1871 was passed, and under which the charters of the cities ceased on the first of June, 1871. The manner for Georgetown was thus prescribed.

The Law in Washington.

The city of Washington was incorporated in 1802. By act of May 4, 1812, the charter was amended so as to enable the

city to improve streets at an expense not exceeding $2.50 per front foot of the lots fronting on the same.

2 Stats., 334, App. D, p. 34.

This was repeated in the amendment of May 15, 1820.

3 Stats., 587, App. E, p. 34.

May 17, 1848, the provision was continued, and the charter itself continued twenty years.

9 Stats., 223.

This provision was preserved by act of May 5, 1864.

13 Stats., 68, App. F, p. 35.

As also repeated in act of February 23, 1864.

13 Stats., 434.

This thus amended charter, by the act of May 28, 1868, was continued indefinitely, and remained in force till June 1, 1871, when it was superseded by the oft-quoted act of February 21, 1871.

15 Stats., p. 61.

See also act of April 6, 1870, repeating this provision to assess the cost of improvements on adjoining property.

16 Stats., 82.

Under the provisions of these statutes all the improvements of the streets were made. I have cited in my brief many of the earlier of the Washington ordinances applying to this rule.

Within the last few years Congress twice paved Pennsylvania avenue, and assessed so much of the cost as it levied on private property, upon the lots abutting upon the avenue.

See act of July 8, 1870, 16 Stats., p. 196, sec. 3.

Act of July 19, 1876, 19 *Id.*, p. 92, sec. 3.

I do not think this was the rule of the Levy Court. Its roads were few and mean.

It is thus seen that the law always was that in the improvements of streets, avenues, and alleys in the two cities the cost was charged on the adjoining property. There never was any other rule. Everybody was familiar with it; nobody knew of any other.

In this condition of the law, with all these years of unvarying practice and usage, Congress addresses this 37th section of the act of February, 1871 to this people, concerning these streets so improved, and which might be further improved. It places them in the control of the new Board of Public Works, and authorized it to charge one-third of the cost of their future improvement upon the property abutting on them, in such manner as shall be prescribed by law.

What would such a people understand—what could they understand? It always had been charged upon property by frontage. That was the law up to that moment. There never had been any other way nor any other law. They understood that was to remain the law, and their Legislature so declared, as did Congress itself by act of April 20, 1871, as we have already seen.

In the brief I submitted at the last term I show that this is the fairest and best practicable mode of assessing the cost. And I am clear that this resume of the existing law and usage shows that those assessments in this respect, charging the cost per frontage, was in strict accordance with law.

Other Objections.

It is said that the act of Congress declares that the board shall assess in such manner as shall be prescribed by law, upon the property adjoining and to be *specially benefited by the improvements*, a reasonable proportion not exceeding one-third of the cost; and that the act of the District Legislature does not prescribe how much within the limit of one-third should be assessed, nor in what manner the benefit to adjoining property should be ascertained.

To this it may be answered, first, the organic law does

not require the prescribing law to fix the *amount* that may be assessed on adjoining property, but only the *manner* of doing it. As to the amount, I am clear that this is a matter of pure discretion with the board—a discretion which cannot be revised. The law shall prescribe the *manner* of assessment. The board within the limit of the law shall say how much. Clearly, the better holding is that all property abutting an improvement is benefited thereby. This is the judgment of the law. It is the decree of that statute which may not be questioned. So much I am certain of, yet how much of the cost, to what extent, not exceeding one-third of its proportion, it has been benefited, is left for the board to say.

Special Damage.

So intimately is the matter of special damage connected with that of special benefits, produced by these special improvements, that one can hardly be considered without some reference to the other.

For instance, if you abandon the rule that it is a presumption of law that all property bounded by a line of improvements is thereby benefited, you are then to enter upon an inquiry as to the benefit of each piece in severalty, which will be found to be a problem of impracticable solution.

Can or should you attempt to apportion the actual benefit to each individual piece of property you will calculate the loss and gain occasioned to it by a given improvement, and strike a balance in favor of or against benefit, within the limits of the law, as the merits of each case may seem to require. The property may be damaged so much that the owner would have to be compensated, and thus become an item of cost instead of a source of revenue. One-third, one-half, or all the property on the line of improvements might be so damaged.

The rights of property-owners under municipalities, in this respect, may be thus stated: The uniform and perhaps only practical rule governing this whole matter is, that whoever acquires or improves property within the limits of a town or

city, does it subject to the municipal right to open new or improve old streets, change their grade, or the character of their improvements, as the laws of the municipality may direct, without acquiring any right to claim damages resulting to them by such action. If land or property is taken for that purpose, owners can claim compensation. If incidentally they are damaged by being above or below the grade, by the falling of the earth of their lots, or by injury to improvements, *not produced by want of care,* there is no ordinary remedy.

They hold their property subject to those vicissitudes and risks.

To state the same rule in another form: The municipality can, by duly enacted law, within the scope of its powers, open, improve, or change streets liable only for property taken and for carelessness in making improvements. If incidentally any owner suffers injury by being left above or below grade, or otherwise, not amounting to an appropriation of his property, no remedy can be had by suit against the corporation.

This is the rule of all the leading States, Ohio excepted. Her courts purposely departed from it, for reasons satisfactory to them. This general rule is recognized in the Supreme Court of the United States in cases arising in the District of Columbia.

For these special injuries or damages the remedy is by application to the Legislature only, either by special or general law.

This was the sound view of this matter taken by the late Legislative Assembly of the District, which passed an act approved June 20, 1872, authorizing owners of property claimed to be specially injured by improvements to file a claim for the same with the Board of Public Works, specifying the nature and amount of the injury. The board was required to examine and report fully in writing what amounts, if any, were deemed just and proper in the several cases to be awarded to the respective owners, taking all actual

benefits into consideration. The report was to be made to the Legislative Assembly for its action, which could alone decide whether any, and how much, should be paid. In no instance could anything be paid until approved by that body, and an appropriation made to pay the same. (4th part Laws Dist. Col., p. 16.)

Thus stands the law.

Special damage could not be allowed. The acts of Congress and of the District Legislature decree that all property along the line of an improvement is benefited. It placed that matter of how much within the limit, at the discretion of the Board of Public Works to decide, and their decision cannot be revised. These acts are correlated by the act of June 20, 1872, which provides the only possible remedy for possible special damages, and thus a property-owner is amply protected.

The only logical conclusion from these premises is—

The law declares that all property along the line of an improvement is benefited thereby.

A reasonable proportion of the costs of said improvement, not to exceed one-third, shall be assessed on said property as the Board of Public Works may direct. Said board, on the special application of the owners of such property, shall investigate the question of fact, and determine whether such property has sustained special damage. If in their opinion it has they shall estimate it, and their report shall be made to the Legislature, with whom the final question of compensation rests. Clearly these two laws rest on a broad principle and are yet counterparts.

The last is a declaration that under the first, the rule of benefits is uniform and universal to all property alike.

The action of the Board of Public Works in assessing one-third of the cost of a given improvement on adjoining property was in strict accordance with the 37th section of the act of February, 1871, and of the act of August 10, 1871, and cannot be revised by the court nor by the Commissioners of the District of Columbia.

The Direct Approval of Congress.

And, *First.* It is to be remembered that the United States owned property in all parts of the District, so that scarcely an extended improvement by the Board of Public Works was made, that did not pass along the front of some of this national domain and was benefited by it. Congress paid for the improvement in every instance.

By act of June 10, 1872, it appropriated the sum $192,620 for improving roadways, sidewalks, &c., in front of property of the United States in the District.

17 Stats., 352.

The act of June 8, 1873, appropriated the sum of $1,241,920.92 to pay for those special improvements in front of the property of the United States. Of this, $33,515.15 was for the Seventh street road.

17 Stats., 405.

The act of March 3, 1873, appropriating $106,533 for the same purpose. And to complete the work the further sum of $913,497.26.

17 Stats., 526.

All of these large sums were paid. Is it urged that these acts of Congress are no recognition of the special assessments, nor yet of the manner of making them? They are a direct recognition and declaration of the sole judge in the premises that these improvements were "authorized by law." It is an end of that controversy. This law came directly and indirectly from Congress. That which it did not enact it approved, as we have seen. Congress knew what the law was. The work was done in its presence by agents of its own creation, and was fully reported, as is set forth in the second paragraph of the bill, p. 2, (Shoe. case,) and as the law required. Congress accepts the work as done under the law, and pays millions for it. To levy, assess, and collect taxes, general or special, is the exercise of the purely political power of which the

Legislature alone can judge, and its action concludes the other departments of the government. The District, so far as in its power to do so, also paid for its share of the costs of this work.

Congress Makes a More Direct Approval of These Assessments and of the Acts of the District Legislature.

I may remind the court, that from the beginning of the late District government there was a powerful, well-organized, vigilant, persistent opposition, composed of able and wealthy citizens of the District—men who criticised everything, opposed everything, obeyed nothing, and paid nothing.

Some of these same men made formal complaint to Congress late in 1871, and so formidable was the attack and so specific the charges, that by resolution of January 22, 1872, the House ordered the Committee on the District to investigate the charges. This was exhaustively done, in a patient hearing running through five months. To the result of this inquiry I shall hereafter invite the attention of the court.

Time ran on. The opposition to the board gathered strength and volume. It never lacked voice.

Finally the two Houses, under the joint resolution of February 2–5, 1874, raised a joint committee of nine. A space in one of the great areas of the Capitol was fenced in, and there the committee solemnly organized. The Governor and the famous Board of Public Works were placed at its bar with their counsel, and arraigned thus, the prosecution, with their counsel, stood forth to inveigh against them.

It was a great national trial. The carefully-prepared charges were met.

The statutes B and H of my little appendix and all the acts of the District Legislature were before the court. All the contracts of the board, all its orders and disorders; its doings, misdoings, and undoings; its plats, surveys, assessments, estimates, collections, and disbursements, everything known or

suspected, were brought fully to its notice. Meantime the famous Safe Burglary was perpetrated in the interests of the defence, whoever were the criminals.

The joint committee reported June 16, 1874. Its investigations, evidence, and papers fill three large volumes.

Congress dealt promptly and summarily with the whole subject. Four days after the report, with one dash of its sponge, it effaced the whole District government, Governor, Board of Public Works, Legislature, and all, from the National black-board, and as if to punish the people of the District, who could not have been guilty for the doings of a government over which they had not the slightest control, Congress laid a tax of three dollars on every one hundred of their property, and cut down the already poorly paid officers and employés of the District government, twenty per cent., and placed the District under a government responsible to Congress alone.

This shows the temper of that body. It was not disposed to look too favorably on the action of the District government. In this mood what did it say and do with these assessments for these special improvements, these threatened certificates of indebtedness? This case was then pending in the courts. Congress was in a frame of mind to have condemned them for cause had it existed, or peremptorily for no cause.

This same act of June 20, 1874, which abolished the old government and created the new commissional government, also dealt with these lesser matters in a way not to be mistaken.

That this may be the better appreciated let me collate some of the provisions of the District acts of August 10, 1871, and May 29, 1873, which became really one law, and a recognition of any part of it, unaccompanied with disapproval of the residue, is a ratification of the whole.

It will be remembered that the third section of the act of August 10th authorized the Board of Public Works to issue

and sell certificates of indebtedness against property where a special assessment remained unpaid.

The first section of the act of May 29 authorized the board to issue certificates of indebtedness against the District for work done, which were made receivable for special assessments.

The fourth section authorized the Commissioners of the Sinking Fund to buy in outstanding assessment certificates as above stated, and to enable them to do it the board might issue further certificates of indebtedness, if needed, similar to those authorized by the first section.

The second, fourth, and eighth sections of the act of June 20, 1874, providing "for the government of the District of Columbia," refer directly to these provisions of the above-named acts. The second section forbids the Commissioners of the District to anticipate the revenues, by sale or hypothecation of the taxes, which refers to the third section of the act of August 10th, and it approves of the provision of the second section of the act of May 29th, which requires that certificates of assessments shall be placed in the hands of the Sinking-Fund Commissioners. The fourth section levies a general tax, and declares that the certificates of the Board of Public Works shall not be received in payment of them, while the eighth section prohibits the further issue of those authorized by the fourth section of the act of May 29th.

18 Stats., 116.

Further and more emphatic is the language of the sixth section of the act, which requires *all* the contracts of the Board of Public Works, written and oral, to be paid, thus legalizing what from any cause may have been invalid.

Later, on the 3d of March, 1875, Congress, with the amplest knowledge of the whole matter, amended the third section of the act of August 10, 1871, so that the sales of property for the non-payment of these special assessments, should be advertised only three weeks instead of four.

Sec. 15, 18 Stats., p. 505.

It is to be remembered that this thus amended section was

the one which authorized a sale of the property charged with one of these special assessments, if the same was not paid.

Thus Congress recognizes the laws, amends and improves them, and seeks to give effect to these very assessments disputed by the plaintiffs in this suit. Can it still be claimed that they are illegal?

Congress Speaks yet More Emphatically.

Time elapsed, these assessments remained unpaid, 1,500,000 or 2,000,000 of dollars, with interest, remained in arrears. The District is quite bankrupt, if that can be true of a municipal corporation. Property-owners not only refused to pay the assessments, but from fifty to one hundred cases are now pending in various stages to prevent the collection of these assessments.

Men whose property have been thus delinquent for five years and more, besieged the two Houses at its last session with their counsel, and were repeatedly heard before the committees, urging reasons why these assessments should never be paid—should be declared void.

Finally, Congress in the solemn form of statute spoke again. This time in the form of a direct command. Men still affect to not understand it. This is what it said:

AN ACT to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia be, and they are hereby, directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the legislative assembly of August tenth, eighteen hundred and seventy-one, as charges upon the property benefited by the improvements in respect to which said assessments were made: *Provided*, That upon complaint being made to the Commissioners, within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessments so complained of, and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a drawback-certificate for the amount of such erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates, as provided by an act of the legislative assembly of May twenty-ninth, eighteen hundred and seventy-three, entitled

"An act for extending the time of payment of special assessments, and for other purposes," after the provisions for the purchase and redemption of certificates named in the act shall have been fully carried out.
Approved June 19, 1878.

Can there be doubt about what this means? It names the act of August 10, 1871, as a valid, sufficient law, one capable of being executed. It is alike a source of power and a warrant for its execution. This mandate in effect declares that the assessments prepared under that act are valid and of binding effect upon property, and it commands the Commissioners to enforce them. It thus approves of the construction of that act by the officers who made the assessments. They understood its scope and meaning, and truly carried them out.

The proviso was to secure justice—is in some sort a response to the clamor of error and fraud in the making up of the assessments, and requires that when complaint is made that any assessment is erroneous or excessive it shall be revised, and if found erroneous or excessive the amount shall be abated, and a certificate of drawback for the excess shall be issued.

It is thus seen that the only error which this statute contemplates as existing is a possible excess of the true amount, for it authorizes the correction of no other.

The assessments cannot be declared void, cannot be increased. When in excess they may be reduced.

In making this revision there is no intimation that the Commissioners are to construe the act of August 10th in any way differing from the construction of the board, which was to add up the whole cost and assess one-third on the adjoining property per foot front, allowing for the exemptions of school and church property. Congress knew that this was the method of the old board, and if in any respect it condemned that, it would have said so.

It knew that charges were made of excessive measurements, erroneous estimates, and errors in the purely ministerial labors of making the assessments. These, when they produced an excessive assessment, were to be corrected, and when corrected

the assessments were to be enforced under the acts of the legislature of August 10, 1871, and May 29, 1873. They are the "existing laws."

The revised assessments are not new assessments. The old proceedings are not void. They may be erroneous, not in principle, not in foundation, but errors have occurred in application of the principle, and these are to be corrected, and only these.

I shall no further discuss this question. It is the main question in all the pending cases.

The Seventh Street Improvement.

The Shoemaker case presents one question of seeming importance to which I invite the attention of the court, and then I remit the further argument of these and of the other questions in the two cases to the counsel for the bank, Mr. W. A. Cook and Mr. W. S. Cox.

To bring this question fully within the apprehension of the court I premise two or three things.

It seems that the Board of Public Woaks drew up a general plan for the improvements of the streets, alleys, roads, and highways of the District, under the date of June 20, 1871, which was addressed to the District Legislature. The body of this, without the schedule of streets, roads, &c., is found on page 8 of the record of the Shoemaker case, as an exhibit to the bill.

In this the Seventh-street road, which was the subject of improvement for which the assessment complained of in that case was made—was mentioned as one of the roads to be improved, and for which the estimate was $25,000.

By act of July 10, 1871, the District Legislature placed in the hands of the Board of Public Works $4,000,000, to be disbursed on its warrants for the general purpose of improvements, which were to be made, as nearly as practicable, pursuant to the above plan of the board.

This act is appendix I, p. 39, of my first brief.

By the seventh paragraph of the much-quoted section 37, act of February, 1871, (appendix A, p. 29–30,) the board is prohibited from making contracts, except in pursuance of appropriations made by law.

It is admitted that the plan of June 20, 1871, with the act of July 10, 1871, are in effect an appropriation of $25,000 for that work, and no more.

The board actually expended on that road $174,000, and this sum is the basis of the assessment which the defendant seeks to enjoin in this case.

Now it is objected that he cannot be assessed for a sum greater than this appropriation would warrant. This sum is the two-thirds to be paid out of the general fund, and one-half of it would be properly chargeable on private property, if this is the true legal aspect of the case.

To this I reply:

1st. The act of July 10, 1871, only requires that the plan of June 20th be adhered to so far as the board may deem consistent with the public good. This really places the whole subject, fund, and appropriation at the discretion of the Board of Public Works.

2d. By the act of August 11, 1871, the District Legislature placed the sum of $500,000 at the unconditional disposition of the board for the improvements of the streets, *roads*, alleys, sewers, &c., of the District. (App. K, p. 41.)

Whatever may be said of the effect of the act of July 10, upon this case, however that question may be settled, it cannot be said in the face of this last act, that the contracts for the improvement of the Seventh-street road were made in the absence of the most ample appropriation.

The improvement of this Seventh-street road was made the subject of one of the gravest charges against the board before the House committee on the first trial of the Board of Public Works under the resolution of January 22, 1872, already referred to.

From Mr. Starkweather's report, made and accepted by the

House as the just and satisfactory exposition of the matter, I beg to read the following:

"The Board of Public Works did make contracts for some improvements not specified in the plan presented to the Legislature, and for some of the improvements specified they expended more than the estimate for the work. Did they therein violate the law, and was this not in pursuance of any appropriation made? It is not claimed but that the additional improvements made, which were not specified, were in entire harmony with those which were specified, and were but an extension and enlargement of the plan before the Legislature. The committee are satisfied that the Legislature did not intend to limit the authority of the Board, in making improvements, to a strict and literal following of the exact plan presented. It had been somewhat hastily prepared, and it seemed to be understood that, to some extent, it was incomplete, and the Legislature only intended that the plan should be the general guide as to the kind and character of the improvements to be made with the money appropriated, so that if this charge rested alone upon the appropriation made in the four-million act, it is difficult to see that it has been violated. But if this were otherwise, the $500,000 appropriation for improvements was without any restrictions whatever, and is sufficient to cover all expenditures made by the Board for improvements that are not specified in the plan of improvements which had been laid before the Legislature.

"It has been urged that by this construction of the laws passed by the District Legislature, a very great, if not dangerous, latitude was given to the Board, so that they were really allowed to expend the money for improvements according to their own discretion. The appropriations were very loosely made, and it does appear that the Legislature intended to confer the power upon the Board to expend the money upon such improvements as they deemed expedient. Whether they judged wisely or not, it cannot be said that the Board violated the law in making contracts and expenditures for improvements which the Legislature had left to their judgment and discretion.

"It is not necessary here to discuss or attempt to decide how limited and specific the Legislative Assembly may make their appropriations, and thus virtually to make all improvements to depend upon their own views of their necessity and propriety. Many if not all the members of the committee are satisfied they may properly restrict their appropriations much beyond what they did in the acts above quoted. It is enough for the present purpose to say that, as the appropriations were made, there was no limitation or restriction placed upon them which has been violated. In relation to this charge, it is somewhat difficult to see the occasion for asking the interposition of Congress, even if the Board had expended money for an improvement without a proper appropriation therefor by the District Legislature, when the improvement itself is a proper and beneficial one, and the Legislative Assembly are satisfied and make no complaint thereof. If the money were expended for an improper purpose, or corruptly misapplied, an appeal to Congress might be necessary and justifiable, as the Board are appointed under the authority of the General Government; but when nothing of this kind is claimed to exist, it would seem properly to rest with the District Legislature to complain that their appropriation had been disregarded. The committee may, as properly here as upon any of the particular charges, say that while in all these improvements they find great cause of commendation for the energy, and liberality, and generous desire to improve and beautify the National Capital on the part of all departments of the District Government, they also find the ordinary and usual errors attendant upon the establishment of a new system of government. There was inexperience on the part of many; there was the lack of careful and cool legislation. In the anxiety to redeem the city from the charge of be-

ing behind, in its streets and public institutions, other cities of the country, the new authorities became somewhat intoxicated with the spirit of improvement."

Rep. 72, H. R., 2d Ses. 42d Cong., p. 3.

Turn again to the views on this point from Mr. Starkweather's report, just quoted, and I invite especial attention to the following paragraph, from page 9, addressed to this Seventh-street road, and the question I am now considering:

"There was also much evidence offered in regard to the expenditure on the Seventh-street road. This road was the only one extending to the District boundary and into Maryland. At times its condition was almost impassable. The testimony is very voluminous, coming from a large number of witnesses. The committee are of opinion, on a view of all the evidence, that the improvement was needed, the work has been properly performed, and at reasonable expense."

After this investigation, in which this work occupied so large a share of time and attention, resulting in this commendation of this improvement, Congress appropriated and paid for its share of it, the sum of $33,515.15.

It is submitted that it can no longer be contended that this entire improvement, to its full cost, was not authorized by law.

Thus have I limited what I call my argument to these two questions. I beg this to be taken as only supplementing the argument of my briefs, the first covering all the questions in both cases, which, for the District, I care to be heard upon. The second is limited to the effect of the act of Congress of June 19, on these cases. Both will doubtless receive as much attention as they are entitled to.

Supreme Court of the United States.

No. 62.

MATTINGLY AND OTHERS

vs.

THE DISTRICT OF COLUMBIA.

On Appeal from the Supreme Court of the District of Columbia.

No. 531.

FIRST NATIONAL BANK

OF THE CITY OF NEW YORK, ET AL.,

Appellants,

vs.

ABNER C. SHOEMAKER.

On Appeal from the District of Columbia.

Supplemental Brief of the District.

A. G. RIDDLE,
Attorney, D. C.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1878.

Supreme Court of the United States.

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FIRST NATIONAL BANK OF THE CITY OF NEW YORK, ET AL., APPELLANTS,
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ABNER C. SHOEMAKER.
No. 531.

On Appeal from the District of Columbia.

SUPPLEMENTAL BRIEF OF THE DISTRICT.

To the Supreme Court of the United States:

May it please the Court.

I beg to ask the attention of the Court to the cases of Mattingly *et al. vs.* The District of Columbia, No. 62, and The First National Bank of New York *et al. vs.* Shoemaker, No. 531, of the last calendar, argued and submitted in this Court at the close of the last term.

Since that time the Congress of the United States passed the following act:

AN ACT to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives

of the United States of America in Congress assembled, That the Commissioners of the District of Columbia be, and they are hereby, directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the legislative assembly of August tenth, eighteen hundred and seventy-one, as charges upon the property benefited by the improvements in respect to which said assessments were made: *Provided*, That upon complaint being made to the Commissioners, within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessments so complained of, and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a drawback-certificate for the amount of such erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates, as provided by an act of the legislative assembly of May twenty-ninth, eighteen hundred and seventy-three, entitled "An act for extending the time of payment of special assessments, and for other purposes," after the provisions for the purchase and redemption of certificates named in the act shall have been fully carried out.

Approved June 19, 1878.

It is believed by the counsel for the District and for the Bank that this law fully sustains their construction of the acts of Congress, of the District Legislature, and the action under them of the late Board of Public Works of the District, contended for by them in their respective arguments, and is conclusive of the questions arising in the records of said cases.

In a late opinion called for by the Commissioners of the District as to the date from which interest should be computed on the revision of the assessments for special improvements, put in issue in these cases, I had occasion to consider the effect of this act in the premises, which quite covers the point to which I ask the attention of the Court. At the suggestion of associate counsel I venture to call attention to the

views there expressed as applicable to the matter now brought to the notice of the Court.

Respectfully,

A. G. RIDDLE,
Attorney, D. C.

Opinion.

Office of Attorney, D. C., *July* 15, 1878.

When on revision special assessments are found erroneous, shall interest accrue from the date of revision or the day when the original assessment was due under the law?

The Case Restated.

Gentlemen: Since my former opinion in this grave matter, I have carefully reviewed the case, and scrutinized all the factors which seem to enter into the question, which may be restated.

The 37th section of the act of February 21, 1871, authorizes the Board of Public Works to improve streets, &c., and assess not exceeding one-third of the cost on the adjoining property as may be provided by law. (16 Stats. at L., 427.)

This was the original of all the special improvements since that time.

The act of August 10, 1871, (Laws Dist., pt. 2, p. 31,) prescribed the mode of assessment in the 1st section. The 2d section declares that within ten (10) days after such assessment the Board of Public Works shall give notice thereof to the owner of the property assessed, requiring payment in thirty days.

Section 3 provides that if such owner shall neglect to pay said assessment after the expiration of thirty days, the Board of Public Works shall "issue a certificate of indebtedness against the property so assessed, which certificates shall bear interest until paid, at the rate of ten per centum per annum."

This is very explicit. Under the authority of these acts, all the assessments were made, notice given, payment refused, and certificates issued.

All manner of objections were raised. The act of the District Legislature was said to be void, insufficient, had not been pursued. The assessments were null, erroneous, &c. Many property owners would not pay. Cases were made in court. Years intervened. The amount of interest became onerous. Finally Congress interposed and settled the main questions, leaving nothing but the day from which interest shall date on the unpaid assessments, to be made out by construction.

It must be obvious that if the new act recognizes the validity of the laws referred to and regards the assessments under them as legal charges on the property, that for the real amount actually due under them, interest must be computed from the time the assessments were made due under the law, thirty days after notice, unless the new law declares otherwise.

On the contrary, if it treats the act of the District Legislature as no law, the assessments as invalid; but in view of the valuable improvements made, undertakes to charge the cost on the property owners, or for any reason legalizes the work done, orders an assessment of its cost, and fixes a time when the new assessments shall be paid, or requires notice of the new assessments, says anything whereby the old assessments are condemned as void, or by which the revision of them would in effect be a new assessment, the interest should date from said new assessment or time when the same shall be due.

Which of these conditions exist under the law? Here is every word of the declaratory part of the act:

AN ACT to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia be, and

they are hereby, *directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the Legislative Assembly of August tenth, eighteen hundred and seventy-one*, as charges upon the property benefited by the improvements in respect to which said assessments were made.

It is thus seen—

1. That the act of the District Legislature is recognized as binding law.

2. That all the assessments made under it are legal and valid.

3. They are to be *enforced according to that act* and acts amendatory of it.

The law goes the whole length, and, in terms, sustains the ground taken by us in the late argument before the Supreme Court of the United States in the Mattingly and Shoemaker cases, not yet decided.

The above is explicit, broad, and unqualified. In the enforcement of these legal assessments under this binding law, it provides further, and this is the entire residue of the law:

"*Provided*, That, upon complaint being made to the Commissioners, within thirty days from the passage of this act, of *erroneous or excessive* charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to *revise such assessments* so complained of, and to *correct* the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a draw-back certificate for the amount of such *erroneous or excessive charges*, which certificate shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates, as provided by an act of the legislative assembly of May twenty-ninth, eighteen hundred and seventy-three, entitled 'An act for extending the time of payment of special assessments, and for other purposes,' after the provisions for the purchase and redemption of certificates named in said act shall have been fully carried out.

"Approved, June 19, 1878."

This gives the Commissioners power carefully limited to *revise and correct* the assessments under either of two conditions, when they are notified under the act—

1. That an assessment is erroneous.
2. Where it is excessive.

And it will be found that these terms mean the same thing. They can in no case declare an assessment void. The utmost they can do is to correct its errors *by remitting its excess of the true amount.*

I do not say that assessments may not be found so erroneous as to be void; as, for instance, when assessed on the wrong property, I have no hesitation in saying that if a case of a void assessment is found, an assessment should be made pursuant to sections 2 and 3 of the above act of August 10, 1871, notice given and that it travel the old round of payment by instalments.

When the assessment is revised and perfected, as thus provided for, then what? Notify the property owners, and wait thirty days, and if not then paid, issue a certificate? Not at all. All that has been done. These are not steps of enforcement. They are steps preparatory to it. The Commissioners cannot issue another certificate of assessment or indebtedness. One has already been issued. This act recognizes the validity of such certificate in the hands of a holder, for it provides that the Commissioners "shall issue to the holder of such certificate a drawback certificate for the amount of such *erroneous* or *excessive* charges."

It is seen that the words "erroneous" and "excessive" in this act are treated as equivalents. The law holds that in every other aspect possible the assessments are accurate, and therefore valid. They are erroneous only where they are in excess of the true amount, and this is the sole matter entrusted to the Commissioners. All their action is to ascertain and correct this wrong, and only this.

The assessment being corrected by reduction to the true amount, the Commissioners are to enforce the collection of it according to existing laws. These are the act of August

10, above referred to, which requires the Board of Public Works, after a year, to sell the property at the request of the holder of the certificate, amended by the act of May 29, 1873, (5 pt. Laws Dist., p. 29,) which made these special assessments payable in five annual instalments, instead of at the end of one year, and was modified by act of Congress of June 20, 1874, (18 Stat. at L., 116,) and the recent organic act of June 11, 1878.

Those who contend that interest on these special assessments is to date from the day of revision must also maintain that the revision is a new assssment, that the new act deals with the old as void, and that property-owners are entitled to the thirty days notice; for by law interest is to commence from the end of that time, and that they are then to have the full five years for their payment, under the third section of the act of May 29, 1873.

Clearly, none of these propositions can be sustained.

We did not make these laws. For one, I have striven for the most liberal construction of all laws, to relieve our people as far as possible from all burdens. Entire loyalty to the law is the duty of my profession, a canon of my duty to you and the public, committed to your hands.

I can see my way to no other conclusion in these premises.

Interest on the revised assessments must date from the expiration of the notice of thirty days, and not from the days of the final revision.

Respectfully,

A. G. RIDDLE,
Attorney, D. C.

To the UNITED STATES COMMISSIONERS, D. C.